Petition

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ELIZABETH PIERCE, Individually and as Guardian ad Litem for MERRY CHRISTINE PIERCE,
Respondents,

vs.

JOHN E. FAIRCHILD, J. SCOTT MATTHEWS and MATTHEWS BROS., INC., an Idaho corporation,
Petitioners.

and

MEMPHIS WHITE LEASING, INC., a Tennessee corporation,
Plaintiff,

vs.

JOHN E. FAIRCHILD, J. SCOTT MATTHEWS, and MATTHEWS BROS. INC., an Idaho corporation,
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Peter J. Boyd (Counsel of Record)
ELAM, BURKE, EVANS, BOYD & KOONTZ
P.O. Box 1559
Boise, ID 83701
Telephone: (208) 343-5454

QUESTIONS PRESENTED

1. Is it manifest error for the federal appellate court to direct a verdict for the plaintiffs in a diversity negligence action by weighing the credibility of the witnesses, after a jury decision was rendered against the plaintiff, which was based upon substantial evidence?

2. Is it permissible for a federal appellate court to hold as a matter of law that implied permission to operate a motor vehicle overcomes express denials of permission, when the state law would clearly leave the question for the jury to resolve?

3. Should a substantial damage award in a contested wrongful death action be set aside as inadequate merely because it did not approximate the testimony as to probable future earnings?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW.	2
JURISDICTION.	2
STATUTES AND REGULATIONS.	3
STATEMENT OF THE CASE	4
JURISDICTION IN THE COURT OF FIRST INSTANCE	19
REASONS FOR GRANTING THE WRIT . . .	19
I. In this negligence diversity action, the Court of Appeals strayed so far from established authority and this Court's guidelines for appellate review that it presents an important supervisory need as well as illustrating the problems with unfettered federal appeallate review of diversity negligence actions. .	19
A. The decision below conflicts with this Court's rule for directed verdicts announced in Continental Ore Co. v. Union Carbide and Carbon Corporation, 370 U.S.	

Page

658, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), and further conflicts with established federal law from all circuits that testimony is not to be weighed on a directed verdict motion. 20

B. Contrary to state law, and to other federal law on the issue, the appellate court found as a matter of law that implied permission to drive inferred from the circumstances outweighed express denials of permission. 28

C. In deciding the case, the appellate court summarily interpreted two areas of state law which have not yet been decided by the highest state court, thereby frustrating the orderly development of state law. 34

II. This Court should formulate a standard for appellate review of excessive or inadequate damages. 36

A. In this case a substantial wrongful death award was set aside for inadequacy on the basis of predictions of future income despite the lack of authority on this question. . 36

Page

CONCLUSION. 47

APPENDICES
Appendix A. A-1
Appendix B. A-21
Appendix C. A-23
Appendix D. A-24
Appendix E. A-26
Appendix F. A-31

TABLE OF AUTHORITIES

Pages

Cases:

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) 23

Brady v. Southern Railway, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943). 22

Bridges v. Groendyke Transport, Inc., 553 F.2d 877 (5th Cir. 1977) 40-41

Butterfield v. Western Casualty & Surety Co., 83 Idaho 79, 357 P.2d 944 (1960). 30

Continental Ore Co. v. Union Carbide and Carbon Corporation, 370 U.S. 658, 82 S.Ct. 1404, L.Ed.2d 777 (1962). 19, 22, 24

Dagnello v. Long Island Railway Co., 289 F.2d 797 (1961) 37

Dimick V. Schiedt, 243 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935). 43

Eckels v. Johnson, 96 Idaho 264, 526 P.2d 1100 (1974). 29

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938). . . . 48

Farm Bureau Mutual Insurance Company of Idaho v. Hmelevsky, 97 Idaho 46, 539 P.2d 598 (1975) 30

Pages

Cases:

Fireman's Fund Insurance Company v. Videfreeze Corporation, 540 F.2d 1171 (3rd Cir. 1976) 23, 25

Grunenthal v. Long Island R. Co., 393 U.S. 156, 21 L.Ed.2d 309, 89 S.Ct. 331 (1968) 36-37, 42

Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942) 35

Hoff v. White Motor Co., 609 F.2d 286 (7th Cir. 1979) 38

Neese v. Southern Railway Company, 350 U.S. 77, 100 L.Ed. 60, 76 S.Ct. 131 (1955). 36, 48

Porter v. Farmers Ins. Co. of Idaho, 102 Idaho 131, 627 P.2d 311 (1981). 34, 35

Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 69 S.Ct. 1233 (1949) 48-49

Service Auto Supply Company of P.R. v. Harte & Co., 533 F.2d 23 (1st Cir. 1976) 25

Silverman v. Travelers Ins. Co., 277 F.2d 257 (5th Cir. 1960). 38-40

Steele v. Nagel, 89 Idaho 522, 406 P.2d 805 (1965) 29

Webb v. Moreno, 363 F.2d 97 (8th Cir. 1966). 31-32

Pages

Cases:

Whiteman v. Pitrie, 228 F.2d 914 (5th Cir. 1955) 39

Wilson v. United States, 530 F.2d 772 (8th Cir. 1976) 25

Wong v. Swier, 267 F.2d 749 (9th Cir. 1959). 23

Wylie v. Ford Motor Co., 502 F.2d 1292 (10th Cir. 1974) 23

Yazzie v. Sullivent, 561 F.2d 183 (10th Cir. 1977). 23, 24-25

Pages

Statutes:

Federal Diversity of Citizenship Jurisdictional Act, 28 U.S.C. § 1332. 19

Idaho Motor Vehicle Safety Responsibility Act, Idaho Code § 49-1521 . . . . . 17, 34

Tort Liability of Owners Act, Idaho Code § 49-1404. . . . . 17, 34

Annotations:

"Excessiveness or Adequacy of Damages Awarded for Personal Injuries Resulting in Death of Persons Engaged in Trades and Manual Occupations," 47 A.L.R.3d 909 42

Textbooks:

5A, Moore's Federal Practice, (Matthew Bender, 1980) § 50.02. . . 24

6A, Moore's Federal Practice, § 59.08(6). 38

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OPINIONS BELOW

The Opinion in the Ninth Circuit Court of Appeals was entered on April 6, 1981, and was initially reported in the advanced sheets at _____ F.2d 1138 (9th Cir. 1981). (Appendix A.) The district court's judgment pursuant to the jury verdict was entered on November 13, 1978 (Appendix E), and the district court order denying alternatively plaintiffs' motions for entry of judgment n.o.v. or for a new trial was filed on November 30, 1978. (Appendix F.)

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on April 6, 1981. (Appendix C.) The order of the Ninth Circuit denying a timely petition for rehearing and rejecting the suggestion for rehearing en banc was entered on September 8, 1981. (Appendix B.) In an order entered May 12, 1981, the opinion of the Ninth Circuit filed on April 6,

1981 was withdrawn as an opinion for publication. (Appendix D.)

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTES AND REGULATIONS

Federal Rules of Civil Procedure, Rule 50(a) covers the motion for a directed verdict and provides:

> A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

The Idaho statute which covers the permissive use of an automobile vehicle provides:

> Every owner of a motor vehicle is liable and responsible for the death or injury to personal property resulting from negligence in the operation of such motor vehicle. . . by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

Idaho Code § 49-1404.

STATEMENT OF THE CASE

This wrongful death negligence action was filed in federal court on the basis of diversity of citizenship. It arose from an automobile accident which occurred on March 24, 1976 in southeastern Idaho. The decedent, James W. Pierce, Jr., was killed when the tractor-trailer he was driving collided with a pickup truck owned by petitioner Matthews Bros., Inc.,[1] and occupied by John E.

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[1]Matthews Bros., Inc. has no parent corporations or subsidiaries, and was owned at the time of the accident by the three individuals identified on pages 7-9 herein.

Fairchild and J. Scott Matthews. The wife and daughter of the decedent brought a wrongful death suit against Matthews Bros., Inc., John E. Fairchild and J. Scott Matthews. It was a hotly contested issue in the jury trial as to who had been driving the pickup truck, but the jury determined that John Fairchild was driving it with the permission of J. Scott Matthews and to serve a purpose, benefit or advantage of J. Scott Matthews. (Appendix A.)

The other main contested issue in the jury trial was whether either of the two occupants of the pickup truck, J. Scott Matthews or John Fairchild, had the expressed or implied permission of the vehicle owners, Matthews Bros., Inc. to be operating the automobile at the time and place of the accident. The jury decided that permission had not been granted to operate the automobile and thus relieved Matthews Bros., Inc. from

liability. Motions for a directed verdict made on behalf of the plaintiffs on the permission issue and for judgment notwithstanding the verdict were denied by the trial court before and after the jury verdict. In fact, at one point during the trial, when plaintiffs moved for a directed verdict on the issue of liability against Matthews Bros., Inc. the able trial judge, the Honorable Ray McNichols, stated that such a question was obviously for the jury:

> Well, I can't decide the issue of whether there was permission or not, certainly. I can't decide that question as a matter of law, and that's rather obvious. (R.T., 718.)

After the motions for a new trial, or in the alternative for a judgment notwithstanding the verdict, were denied, plaintiffs appealed the jury verdict to the Court of Appeals for the Ninth Circuit. In an unpublished opinion, the Ninth Circuit ruled that the trial judge had erred as a matter of law in not directing

a verdict for the plaintiffs on the permissive use question. The court also ruled that the substantial damage award of $75,000.00 assessed against J. Scott Matthews and John Fairchild was inadequate as a matter of law and reversed and remanded the case for a new trial on damages only. The appellate court left open the question of whether punitive damages might also be assessed against Matthews Bros., Inc. on a new trial of damages. (Appendix A.)

It is necessary at this time to outline in some detail the conflicting and substantial evidence presented to the trial court as to whether permission to operate this vehicle was granted, to enable this Court to appreciate just why it was so obvious that this question was an appropriate one for a jury to resolve.

The references are to the reporter's transcript, certified for appeal pursuant to Supreme Court Rules 19.1 and 19.2.

J. Scott Matthews was 29 years old when the accident occurred. (R.T., 104.) His father, Ennis Matthews, was one of the three stockholders of Matthews Bros., Inc., the owner of the pickup truck involved in this accident. (R.T., 120, 1001.) The other stockholders were Maurice Matthews, the uncle of J. Scott Matthews, and his grandmother. (R.T., 1023.) Although Scott Matthews had used Matthews Bros., Inc. or family vehicles as he was growing up (R.T., 281), a history was established during trial that, except for one incident, he did not use corporate vehicles for a period of at least a year and one-half prior to the accident. (R.T., 181-83; 294-97; 308-09; 1008-10; 1051-52; 1073-77.) This history was contradicted by only vague recollections of acquaintances of J. Scott Matthews that they had seen him in various vehicles at different periods of time. (R.T., 334-35; 384-85.) They

could not really identify whether the vehicles were Matthews Bros., Inc. vehicles or what the time periods were when J. Scott Matthews was observed driving them. (R.T., 361-64; 387-89.)

It developed during trial that J. Scott Matthews had gone through a divorce in early 1976 and was living in either Burley or Oakley, Idaho from January 1, 1976 until the time of the accident, March 24, 1976. (R.T., 104-08.) He stayed infrequently at his parents' house during this time interval, the exact number of times being the subject of conflicting testimony. (R.T., 108-10; 242-43; 1010; 1034-35; 1049-50.) It also developed during trial that J. Scott Matthews was a bit of a "black sheep" in the family as he had previously sued Matthews Bros., Inc. on a lease, and the bad feelings had not entirely resolved by the time of the accident. (cf. R.T., 282-91.) Furthermore, there was some

testimony that J. Scott Matthews drank and smoked marijuana during this period of time and was not gainfully employed for some months prior to the accident. (R.T., 106; 111; 144.)

At the conclusion of the lease disagreement, the general permission of J. Scott Matthews to use any of the Matthews Bros., Inc. equipment was revoked in a written instrument. (R.T., 296-97; 1005-06.) It was debated in the trial whether this instrument was relevant evidence, but there was also testimony from the father of J. Scott Matthews, Ennis Matthews, that no general permission was given to operate any of the corporation's vehicles after the document was executed. (R.T., 1073-75.) On one occasion in January, 1976, J. Scott Matthews borrowed a corporate truck without permission, and he, his father, and uncle all testified that it was made clear to him on that occasion

that he did not have permission to borrow company vehicles then or thereafter. (R.T., 181-82; 294-95; 1009-11.)

Moving closer to the time of the accident, the pickup truck in question was purchased by Matthews Bros., Inc. just a few days prior to the time of the accident. (R.T., 132-34.) Although J. Scott Matthews told friends that the pickup was purchased for his use, he testified on the stand that he lied about those statements and told his friends this to boost his image in their eyes. (R.T., 130-32; 166; 208.) Maurice Matthews and Ennis Matthews both testified that the pickup was purchased for general farm use and was available to a Mr. Manning at or near the time of the accident to help feed the cattle. (R.T., 301-02; 1011-14.)

For the few days before the accident, J. Scott Matthews was helping Manning to feed the cattle. (R.T., 239-40.) He was

not being renumerated for this service, however, from either Manning or from Matthews Bros., Inc., both of whom owned some cattle benefitted by the feeding. (R.T., 116; 241; 1082-83.) Both Mr. Manning and J. Scott Matthews testified that the help was offered to see whether the two of them could get along in a working relationship, since J. Scott Matthews was intending to lease some ground from Manning in the future. (R.T., 116; 258-59.) Although J. Scott's father, Ennis Matthews, was aware that the two of them were spending some time together, Ennis never saw them feed the cattle together and denied giving his son express or implied permission to drive the pickup in this process. (R.T., 1078-79; 1086-88.)

Scott did drive the pickup while he and Mr. Manning fed the cattle on March 23, 1976, the day before the accident. (R.T., 242.) Mr. Manning never

gave him permission to do this either, and testified that he did not know what arrangements, if any, Scott made with his father for the use of that vehicle. (R.T., 257; 273.) He further testified he didn't think he had authority to prevent J. Scott from using the pickup. (R.T., 271-73.) In any event, Scott took the pickup for a period of time on March 23, 1976 and also March 24, 1976, the day of the accident. (R.T., 141-44.) Although Mr. Manning, Maurice Matthews, and Ennis Matthews all met briefly the day of the accident, they did not talk about the pickup or its whereabouts. (R.T., 255-56; 1018.) There is no evidence that Maurice Matthews or Ennis Matthews knew the vehicle was missing or taken. (R.T., 309-10; 1017; 1084.) Manning told them Scott had gone to town but did not tell them that Scott had taken the Matthews Bros., Inc. pickup in question. (R.T., 256; 310; 1036-37.)

Although Scott did not have an operational vehicle of his own on the day of the accident, neither Maurice Matthews nor Ennis Matthews knew this. (R.T., 310, 1037-38.) Both Maurice Matthews and Ennis Matthews denied giving permission at any time for the use of any farm vehicles during the years 1975 and 1976, and expressly denied giving Scott permission to use the pickup in question at or near the time of the accident. (R.T., 1009-10; 1017; 1075-79; 1084.)

When the pickup was taken from the Matthews Bros., Inc. lot, the keys were in the pickup as this was the normal practice for Matthews Bros., Inc. vehicles parked in that spot. (R.T., 141; 305.)

Against this substantial testimony from three adults, including that of J. Scott Matthews who would have benefitted from a finding of permissive use, that no express or implied permission was

given to use the vehicle in question, or any other Matthews Bros., Inc. vehicle, the appellate court listed the following evidence which tended to prove implied permission:

> 1. Mathews Bros., Inc. was a family-type corporation.
>
> 2. When younger, J. Scott had driven his father's or corporation vehicles.
>
> 3. J. Scott had told individuals the pickup was purchased for his use.
>
> 4. At the time of the accident he owned no operable vehicle.
>
> 5. He drove the vehicle extensively the day before and the day of the accident.
>
> 6. The truck was purchased to feed cattle. J. Scott had used it in that fashion just before the accident.
>
> 7. Manning, who had charge of the truck, did not prevent its use by J. Scott.

(Appendix A.)

On this state of the record, the appellate court ruled as a matter of law that the implied permission from various circumstances in the case and from its

actual use at the time of the accident overruled the express testimony that no permission was given. Therefore, Matthews Bros., Inc. were liable for the negligence of John Fairchild, the driver of the pickup at the time of the accident. In doing so, the appellate court admitted weighing the credibility of the witnesses in the course of its opinion:

> Balanced against this weighty evidence of at least implicit permission to use the company truck are the bald assertions of interested parties, many of which directly contradicted testimony given at earlier depositions, that Scott was forbidden from using company vehicles. (Emphasis added.)

In announcing the "rule of law" that evidence of implied permission outweighed express denials, the court again stated, though it tried to avoid doing so, that the witnesses were lying when they denied that J. Scott Matthews had permission:

> The fact that an owner verbally forbade someone from using a vehicle with the understanding that he could use it anyway cannot operate to enable the

owner to escape liability. . . (Emphasis added.)

The appellate court not only weighed the credibility of witnesses and announced a new rule of law in the area of permissive use of a vehicle, they extended the law of the state of Idaho in two areas with little or no analysis. It was held as a matter of law that Idaho Code § 49-1404 and the Idaho Motor Vehicle Safety Responsibility Act, codified at Idaho Code § 49-1521, were identical so far as "permission" was concerned. It was also held that lost inheritance should be a form of damages allowed under Idaho's wrongful death statute. (The damage facts are set forth more fully below.)

So far as the damages were concerned, there was evidence that the decedent was 36 and in good health when he was killed and that he had a life expectancy of about 36 more years. His working life expectancy was about 29 more years and he

earned from $16,000.00 to $18,000.00 up until the time that he was killed each of the last three years of his life. The plaintiff wife worked regularly at the time of the accident, and the plaintiff daughter was 15 years old. Even though plaintiffs were awarded more damages than their out-of-pocket losses from the time of the accident to the time of the trial, the appellate court held that the damages were inadequate primarily because they did not compensate the survivors for the expectancy of lost wages in the future. Characterizing the jury award as "miserly," "manifestly unjust," or "Scrooge-like," the appellate court found that the failure of the trial court to grant a new trial on damages was an abuse of discretion. (Appendix A.) Thus, the "doubly exceptional" actions were taken in this case of reversing a denial of a directed verdict motion for the plaintiff, and of reversing the denial of a new

trial for damages on a very "unexceptional" record. No passion, prejudice, or error of law were even hinted at by the court below.

JURISDICTION IN THE COURT OF FIRST INSTANCE

The basis for federal jurisdiction in the district court was diversity of citizenship, codified in 28 U.S.C. § 1332.

REASONS FOR GRANTING THE WRIT

I.

IN THIS NEGLIGENCE DIVERSITY ACTION, THE COURT OF APPEALS STRAYED SO FAR FROM ESTABLISHED AUTHORITY AND THIS COURT'S GUIDELINES FOR APPELLATE REVIEW THAT IT PRESENTS AN IMPORTANT SUPERVISORY NEED AS WELL AS ILLUSTRATING THE PROBLEMS WITH UNFETTERED FEDERAL APPELLATE REVIEW OF NEGLIGENCE ACTIONS.

A. The decision below conflicts with this Court's rule for directed verdicts announced in Continental Ore Co. v. Union Carbide and Carbon Corporation, 370 U.S. 658, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), and further conflicts with established federal law

from all circuits that testimony is not to be weighed on a directed verdict motion.

Normally in diversity cases, the Court of Appeals is truly the "court of last resort." Particularly in negligence actions, which are grounded in the law of the state where the case is tried, there are few issues interpreting federal statutes or the United States Constitution. But occasionally an exceptional case like this arises which merits this Court's attention. This case illustrates all of the problems of federal review of negligence actions, rolled into one short opinion. Here the aggrieved plaintiffs, dissatisfied with an adverse jury verdict after a lengthy and strenuous trial, were given a complete victory by the circuit court. Despite the removal of the opinion from publication, such a result will add to the burden of the clogged federal system as dissatisfied litigants at the trial level try to get more favorable

treatment from the next level in the system.

Though there is little the circuit courts can do to refrain from hearing a diversity appeal, it would seem that a minimum step to eliminate unnecessary appeals would consist of giving great weight to the trial court and jury verdicts. Such a course of action is indeed mandated, especially in reviewing motions for directed verdicts and judgments n.o.v. based upon the sufficiency or insufficiency of the evidence. Lip service is given in our opinion to this principle of deference, but the court then weighed the credibility of witnesses, sat as another jury, invented a new rule of interpreting permissive use, and extended Idaho law in two new directions at once. These types of actions will inevitably generate more business for the federal system unles this Court exercises supervision in this critical area.

In Continental Ore Co. v. Union Carbide and Carbon Corporation, 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962), this Court stated:

> The court of appeals was, of course, bound to view the evidence in the light most favorable to Continental and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.
>
> As Professor Moore has indicated, "In ruling on the motion (for directed verdict) the trial court views the evidence in the light most favorable to the party against whom the motion is made. On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify." [Citations omitted.]

Continental, supra, at 696, 1409. See, also, Brady v. Southern Railway, 320 U.S. 476, 479-80, 64 S.Ct. 232, 88 L.Ed. 239 (1943), where it was stated that the credibility of the witnesses should not be weighed when considering a directed verdict motion.

Many other cases in the federal circuits have stated that the credibility of witnesses must not be weighed in a motion for directed verdict. See for example the cases of Yazzie v. Sullivent, 561 F.2d 183, 188 (10th Cir. 1977); Fireman's Fund Insurance Company v. Videfreeze Corporation, 540 F.2d 1171, 1178 (3rd Cir. 1976); Wylie v. Ford Motor Company, 502 F.2d 1292, 1294 (10th Cir. 1974); Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969); and Wong v. Swier, 267 F.2d 749, 752 (9th Cir. 1959). In the Wylie case, involving an issue of a defective product in a diversity jurisdiction lawsuit, the court stated:

> Also the trial court, when considering a directed verdict motion, may not weight the evidence or determine where the preponderance of evidence lies. The court should not consider the credibility of witnesses, and only clearly incredible evidence should be excluded from the court's consideration.

Wylie, supra, at 1294.

On appeal too, the rules are the same. The appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was made, and give him the advantage of every fair and reasonable intendment that the evidence can justify. 5A, Moore's Federal Practice, § 50.02; Continental Ore Co., Id.

The reasons why the credibility of the witnesses should not be evaluated in a motion for a directed verdict at either the trial court or the appellate level are enunciated in Yazzie v. Sullivent, supra, at 188:

> The court is not to weigh the evidence or pass on the credibility the witnesses or substitute its judgment for that of the jury. Rather, it must view the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. The philosophy of this doctrine is that there must be a minimum of interference with the jury. . . Charles Allen Wright in

> his Law of Federal Courts has cited a series of Supreme Court decisions reversing judgments of lower courts which have taken away from the jury cases arising under Federal Employers' Liability and Jones Acts. The Supreme Court has held that so long as there is evidence from which an inference might rationally be drawn as to how the accident happened or whether defendant's conduct was negligent, it is for the jury to accept or reject the inference even though it may be improbable and even though some conflicting inference is highly probable.

Another well established rule in reviewing directed verdict motions is that entering a directed verdict for the party having the burden of proof is rare, reserved for extreme or exceptional circumstances. Fireman's Fund Ins. Co. v. Videfreeze Corp., supra; Wilson v. United States, 530 F.2d 772, 777 (8th Cir. 1976); Service Auto Supply Co. of P.R. v. Harte & Co., 533 F.2d 23, 24-25 (1st Cir. 1976). While again parroting this rule, the court in our case enunciated no exceptional circumstances and lamely suggested they could not understand why the jury decided as they had.

On page 1141 of the opinion in this case, the appellate court admitted considering the credibility of the parties:

> Balanced against this weighty evidence of at least implicit permission to use the company truck are the bald assertions of interested parties, many of which directly contradict the testimony given at earlier depositions, that Scott was forbidden from using company vehicles. See, e.g., Trial Transcript at 295-96, 1091-92. Even if one were to accept these assertions as true -- as was well within the jury's prerogative -- they could not outweigh the substantial and convincing evidence of implicit permission. (Emphasis added.)

The two examples given by the appellate court of contradicted testimony involved collateral points to the main issue of whether Scott had permission to use the pickup on the occasion in question. On pages 295 and 296 of the Trial Transcript, Mr. Ennis Matthews stated that he did forbid Scott from using company vehicles after the one episode of the borrowed truck and his deposition was

then read which tended to establish that he had not explicitly denied permission for Scott to use company vehicles after that one episode. However, on page 297, Mr. Ennis Matthews defended his change in position by referring to the termination of the lease arrangements embodied in a document introduced in evidence in the trial.

Likewise, the transcript at pages 1091 and 1092 again involved testimony of Ennis Matthews' reference to the episode when the vehicle of Matthews Bros., Inc. was taken an earlier time by Scott Matthews. As any experienced trial lawyer or judge is aware, frequently there is a discrepancy in the testimony of witnesses between the time of their deposition and the time of trial, and this is precisely the type of discrepancy or conflict in the evidence which trial judges and juries are particularly capable of resolving. On the other hand, to

rely upon such a conflict in testimony at an appellate level from a cold record is such an obvious example of exceeding the bounds of normal appellate procedures that no further comment is merited.

B. Contrary to state law, and to other federal law on the issue, the appellate court found as a matter of law that implied permission to drive inferred from circumstances outweighed and defeated express denials of permission.

Just after the portion of the appellate opinion in which the credibility of the witnesses was discussed, the court makes this astonishing assertion:

> The fact that an owner verbally forbade someone from using a vehicle with the understanding that he could use it anyway cannot operate to enable the owner to escape liability under Idaho Code § 49-1404. When conclusive evidence of implicit permission undercuts even an express prohibition, § 49-1404 is satisfied and the owner may be held liable for injuries and damage resulting from the vehicle's operation.

Not only is there no authority cited for this proposition, the proposition is

contrary to Idaho law on the issue of implied or express permission to operate a motor vehicle. Steele v. Nagel, 89 Idaho 522, 530, 406 P.2d 805 (1965) held only that when at the time of an accident an employee of the vehicle's owner is driving the vehicle, the jury may infer that the employee was operating the vehicle with the owner's permission. The court was careful to observe, however, that "this inference, of course, may be rebutted. . ." (Emphasis added.) In that case the permissible inference of the employee operating the vehicle simply created a triable issue of fact and the court remanded the case for a jury determination. Similarly, in Eckels v. Johnson, 96 Idaho 264, 526 P.2d 1100 (1974), the court held again the jury may infer implied permission from the fact of a family relationship and reversed the summary judgment for defendant. The case was remanded for a trial on the factual

issues. The other two cases cited by the court of appeals, Farm Bureau Mutual Insurance Company of Idaho v. Hmelevsky, 97 Idaho 46, 539 P.2d 598 (1975) and Butterfield v. Western Casualty and Surety Company, 83 Idaho 79, 357 P.2d 944 (1960) are inapplicable. In the first cited case, the court held as a matter of law that so long as general permission was given occasionally to use a family vehicle in a family context situation, precise permission to do what the driver was doing at the moment of an accident was unnecessary. In our case, of course, the question of general permission was at issue throughout the trial and there was certainly no permission given to have the vehicle at the time in question in any event. Likewise, in Butterfield v. Western Casualty and Surety Company, supra, the permission question involved permission of subpermittees and not the general permission given to use the

vehicle in the first instance. Thus, there are no Idaho cases following the rule announced by the appellate court as dispositive of our particular case.

The few other recent federal appellate decisions rendered concerning the issue of permission to drive do not support the rule announced by the Ninth Circuit in this case. In Webb v. Moreno, 363 F.2d 97, 100 (8th Cir. 1966), the issue under consideration was similar to that of our case. The statute quoted from the Iowa Annotated Code was also substantially similar to that of the Idaho Code. There the court pointed out that Iowa law created an inference that the vehicle was operated with the consent of the owner whenever the ownership of the automobile was admitted, but that the inference did not change the burden of proof and that the issue was peculiarly one for the jury:

> The owner may oppose the inference by such admissible testimony as may be available to him. But such testimony, though positive and direct, is not necessarily conclusive. It may be weakened or rebutted by facts and circumstances, or by its own inherent weakness or unreasonable character. The weight of the testimony and credibility of the witnesses depend upon facts and conditions as shown by the record in each case. This particular issue, as it comes before the courts, is one which the average jury is peculiarly well fitted to pass upon and arrive at a correct conclusion.

Actually the Webb case is much stronger for a directed verdict in favor of consent than is our case, and there the matter was left to the jury. The owner conceded that if he had been requested to do so he probably would have consented to having the gentleman drive the vehicle that was actually driving when the accident occurred. In our case, Maurice Matthews and Ennis Matthews repeatedly stated that J. Scott Matthews did not have permission to drive any Matthews Bros., Inc. vehicles at the time of the accident.

In Riverside Insurance Company of America v. Smith, 628 F.2d 1002 (7th Cir. 1980), the appellate court upheld a directed verdict for the owner of the automobile and found that there was insufficient evidence in the record to support the jury's inference of implied consent pursuant to Indiana law. There the owner had given express consent for her daughter to have someone else use the vehicle if her daughter was incapacitated, but not to serve the purposes of a third party in the absence of the daughter being incapacitated.

No other federal appellate cases could be found in which testimony of express denial of permission to use an automobile was outweighed as a matter of law by the circumstances involving the use of the autmobile under the rubric of implied permission. For that reason alone, notwithstanding other errors, this Court should reverse and reinstate the jury verdict.

C. In deciding the case, the appellate court summarily interpreted two areas of state law which have not yet been decided by the highest state court, thereby frustrating the orderly development of state law.

In a footnote, the court below stated that "permission" as used in Idaho Code § 49-1404 should mean the same as "permission" as used in Idaho Code § 49-1521 (Motor Vehicle Safety Responsibility Act). The latter statute was not even at issue in the case, but the court referred to it, presumably because the Farm Bureau case had interpreted the latter statute broadly. The court hus sought support for its own strained interpretation of "permission" under § 49-1404 by using the Farm Bureau case and arguing that the statutes had similar purposes. A more recent pronouncement of the Idaho Supreme Court has cast grave doubts upon this reasoning. In George Porter v. Farmers Ins. Co. of Idaho, 102 Idaho 131, 627 P.2d 311, 314 (1981), the Supreme Court

compared a portion of the Motor Vehicle Safety Responsibility Act to the typical "household exclusion" in an automobile policy. In the course of its opinion, the Court specifically refused to extend its analysis of the Motor Vehicle Safety Responsibility Act to a similar statute, the compulsory insurance law:

> Since the compulsory insurance law did not become effective until after the date of the accident in this case, its effect upon the exclusions is not at issue, and we do not express an opinion on it.

Another footnote established the error of refusing to instruct the jury on lost inheritance damages in wrongful death cases even though the Idaho Supreme Court has never ruled on the issue. The very case cited as support for this idea, Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942), failed to list lost inheritance as an element of damages in wrongful death cases! Once again the appellate justices, one sitting from the Fifth

Circuit and two from the Ninth Circuit, "adjust" Idaho law to fit their ideas of a fair recovery in the guise of review of a diversity action.

II.

THIS COURT SHOULD FORMULATE A STANDARD FOR APPELLATE REVIEW OF EXCESSIVE OR INADEQUATE DAMAGES.

A. In this case a substantial wrongful death award was set aside for inadequacy on the basis of predictions of future income despite the lack of authority on this question.

The last pronouncement by this Court on the subject of excessive or inadequate damages was set forth in the case of Grunenthal v. Long Island R. Company, 393 U.S. 156, 21 L.Ed.2d 309, 89 S.Ct. 331 (1968). There the Supreme Court, following the procedure also used in Neese v. Southern Railway Company, 350 U.S. 77, 100 L.Ed. 60, 76 S.Ct. 131 (1955), reversed the action of the appellate court and reinstated the judgment of the district court without setting forth

an appropriate standard for reviewing whether a jury award is inadequate or excessive. The Court did quote from the opinion rendered in Dagnello v. Long Island Railway Company, 289 F.2d 797, 806, 802 (1961) that:

> We appellate judges [are] not to decide whether we would have set aside the verdict if we were presiding at the trial, but whether the amount is so high that it would be a denial of justice to permit it to stand. We must give the benefit of every doubt to the judgment of the trial judge; but surely there must be an upper limit, and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.
>
> * * *
>
> The standard has been variously phrased: "Common phrases are such as: 'Grossly excessive,' 'inordinant,' 'shocking to the judicial conscience,' 'outrageously excessive,' 'so large as to shock the conscience of the court,' 'monstrous' and many others."

Grunenthal, supra, at 313.

There has been no definite pronouncement from this Court, either, as to the

standard to be used by appellate courts in judging the inadequacy of damages as opposed to excessive damages, and appellate courts have largely fashioned their own standards in this area. As pointed out in 6A, Moore's Federal Practice, § 59.08(6), the present standard used by the appellate courts, of relatively recent origin, is that the trial judge has abused his discretion. Despite such a characterization, however, the cases continue to use various phrasology to pin down the moment at which an abuse of discretion has occurred. For example in the case of Hoff v. White Motor Company, 609 F.2d 286 (7th Cir. 1979), the court continued to use words such as "grossly excessive," "monstrous" or "shocking to the judicial conscience." In the case of Silverman v. Travelers Insurance Company, 277 F.2d 257 (5th Cir. 1960), this language was used in reviewing a verdict said to be inadequate as a matter of law:

> . . . The term "discretion," when invoked as a guide to judicial action means a sound discretion, exercised with regard to what is right and in the interests of justice. In Whiteman v. Pitrie, 5th Cir. 1955, 220 F.2d 914, 919 Judge Rives, for the Court, reviewed the tests that have been applied in determining if there has been an abuse of discretion, and concluded: "When all is said and done, however, the question by its very nature is one for which there can be no rule of thumb answer. Attempts at defining or making more certain the tests of abuse of discretion do not usually furnish reliable guideposts, nor tend to clarify the rule."

Silverman, supra, at 260. Later on in that same case, which was a wrongful death action, the court reviewed previous cases involving inadequacy of damages and stated:

> In each of these cases the inadequate amount of damages reflected some error in the proceedings. This is not to say that there may not be cases in which a trial court may abuse this discretion in failing to grant a new trial when the sole reason for the new trial is that the damages are inadequate. It is to say that in an action for wrongful death, when there is no prejudicial error, an appellate court should discipline itself not to substi-

> tute its judgment for a jury's verdict, or its discretion for the reasonable exercise of a trial judge's discretion. A jury may be as competent as a district judge, and may be more competent than a district judge, and a district judge may be as competent, and maybe more competent, than an appellate court, in the assessment of such intangibles as love and affection, grief and anguish.

Silverman, supra, at 263-64.

In the case of Bridges v. Groendyke Transport, Inc., 553 F.2d 877, 874-80 (5th Cir. 1977), the court noted that the applicable standard was an abuse of discretion, but then elaborated on this standard in the following terms:

> The Supreme Court, therefore, has not given its approval to any particular standard of review to be applied by this court. Although some cases state that the test to be applied on review is merely "abusive discretion," most cases add limiting adjectives to indicate that appellate courts should be very reluctant to reverse on this ground, and should do so only on the strongest of showings. This court has said that reversal should occur only for "grave abuse of discretion," or only if the verdict is "so gross or inordinantly large as to be contrary to right reason," or

> only if there has been a "clear abuse of discretion with respect to assessment of damages." [Citations omitted.]

In the case at issue, the appellate court itself used words such as "gross inadequacy," "manifestly unjust," "miserly," or "scrooge-like penuriousness." However, it was also stated in that opinion that a judge's denial of a motion for a new trial on damages in a case tried before a jury may be reversed only for an abuse of discretion, with such a finding to be made only in "shocking" or "exceptional" circumstances. It was also stated that the appellate court in such an instance is faced with a double hurdle: it must first find that the jury's damage award is inconsistent with the evidence, and then find that the trial court abused its discretion in not setting aside. (Appendix A, p. 1142.)

With respect to wrongful death awards attacked as excessive or inadequate, an exhaustive annotation is

presented at 47 A.L.R.3d 909 which illustrates the great diversity of results reached in the various federal districts or states concerning the test of the adequacy or inadequacy of damages. There was only a smattering of cases reported, even in this annotation, concerning the inadequacy as a matter of law of wrongful death awards, with little rhyme or reason evident in the results classified therein.

It is certainly not this court's function to sit as the final arbiter concerning the excessiveness or inadequacy of damages rendered by a jury in a diversity action. In view of the suggestions given in Grunenthal, supra, however, that the appellate court should make a detailed appraisal of the evidence bearing on damages when ruling on such motions, it would be of great guidance to appellate courts and a substantial aid in reducing unnecessary litigation in the federal system with respect to diversity

cases, if a clear cut standard was announced which governed the damage awards in these areas. Unlike the situation with excessive awards, moreover, there are no phrases such as "monstrous" or "shocking" which are regularly used to review verdicts argued to be inadequate. In view of the great deference to jury verdicts and to the fact finding process encompassed within the trial court, cf. Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935), the standard should be conservative and definitive enough so that a minimum of detailed re-examinations of the record upon review of a motion for new trial on the issues of damages should be needed by the appellate court.

In our case, the only exceptional circumstances noted by the appellate court was the failure of the jury to award the plaintiff mother and daughter the damages flowing in the future based

upon the testimony of the economist, and taking into consideration the health of the decedent and his life expectancy:

> In the case at bar, the jury awarded plaintiffs $75,000.00 for the death of James Pierce. The uncontradicted evidence at trial showed that the decedent was 36 years old and in good health when killed. He left surviving a wife and 15-year old child. Trial Transcript at 597, 668-701. He had a life expectancy of about 36 more years, and could have expected to continue working for about 29 more years had his life not been tragically cut short. Id. at 609-11. The decedent earned about $16,000.00 in each of the years 1973 and 1974, and in 1975, the last year of his life, he earned about $18,000.00. Id. at 608; plaintiffs' Exhibit 65, 66 128. Taking only lost wages into account, and not even considering cost of living increases of other salary raises which might be expected, a simple exercise in multiplication reveals the gross inadequacy of a $75,000.00 award. (Appendix A, pp. 1142-43.)

Later on in the opinion, the appellate court noted that the award was more than the out of pocket loss the plaintiffs had sustained, since the lost wages until the time of trial, adjusted for the

contributions made by the decendent solely for the support of his family, was $58,000.00. Thus the appellate court in our situation held as a matter of law that the damages were inadequate because they did not approximate the multiplication of the earnings for the last few years multiplied for the statistical average working life of the decedent.

Once again, no judicial support in state or federal law is cited for this proposition. Indeed, although it is common knowledge that wrongful death awards have risen significantly in the last decade, it is also true that such awards are only probabilities and depend upon statistical predictions enumerated at length in the trial transcript, pages 651 to 667. We are not yet at the state where an appellate court can make a simple multiplication and determine whether or not a jury verdict is excessive or inadequate as a matter of law.

If the decedent statistically had an average of 29 more years to work, would the appellate court have set the verdict aside if the jury had awarded damages based upon only 15 more years of working expectancy, for example? Unlike the usual case for setting aside a verdict as inadequate based upon failure of the jury to award the out of pocket expenses suffered by a plaintiff, the appellate court's action in this instance raises serious questions concerning the reliability of statistical projections of future economic conditions, cost of living, etc. Appellate courts are on far safer ground when giving great weight and discretion to the jury and to the trial judge with respect to the inadequacy or excessiveness of a verdict than the appellate court did in our instance. As stated in Bridges v. Groendykie Transport, Inc., supra, at 880:

The rationale behind employing such a strict test on review is fairly simple. The size of the award a claimant is entitled to is generally a question of fact. A panel of impartial jurors that had an opportunity to hear all the evidence and observe all the witnesses first decided that question. A trial judge, with a similar opportunity to hear and observe, then concurred with the propriety of the panel decision when he or she denied the defendants' motion for a new trial. A reviewing court should be exceedingly hesitant in overturning the decision of the jury and the trial judge. The appellate court's decision must necessarily be made without the opportunity to observe the claimant and the various other witnesses. Also, the factors which must be considered in determining the amount of money a claimant is entitled to are not readily translated into dollar amounts. In most cases, there is no reason to assume that a three judge appellate court is better equipped to make this translation than a panel of jurors or the trial judge. In fact, the opposite assumption is more appropriate. It is therefore, only on a very rare occasion that a jury verdict, approved by a trial judge, should be overturned.

CONCLUSION

Although the panel in our case may have been expressing a dissatisfaction

with diversity appeals, or a desire to be done with the litigation once and for all, the results of their actions will have the precisely opposite effect of encouraging more and more appeals of diversity cases. Unless this Court reverses summarily as in Neese v. Southern Railway Co., supra, or entertains this case to exercise much needed supervision of the scope of appellate review of liability and damage issues in the diversity area, the type of actions taken by the circuit court will only encourage more disgruntled litigants to try that forum. Furthermore, Idaho substantive law is controlling under Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938), which was "premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court." Ragan v. Merchants

Transfer & Warehouse Co., 337 U.S. 530, 69 S.Ct. 1233, 34 (1949). In our case the rights of the parties did vary because of the conclusions reached by the court with respect to permissive driving, and because of two unwarranted extensions of Idaho law. The inescapable result of all of the actions taken in this case, unless corrected, will be further erosion of the traditional fact-finding functions of the jury, the cornerstone of our judicial process.

For all of the foregoing reasons, this Court should grant the Petition for Certiorari.

Dated: December 3, 1981.

RESPECTFULLY SUBMITTED,

PETER J. BOYD

By_____

Peter J. Boyd
(Counsel of Record

ELAM, BURKE, EVANS BOYD & KOONTZ
P.O. Box 1559
Boise, ID 83701

Attorneys for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Elizabeth Pierce, Individually and as
Guardian ad Litem for
Merry Christine Pierce
Plaintiffs-Appellants,

v.

John E. Fairchild, J. Scott Matthews,
and Matthews Bros., Inc.,
an Idaho Corporation
Defendants-Appellees.

Memphis White Leasing, Inc.,
a Tennessee Corporation
Plaintiff,

v.

John E. Fairchild, J. Scott Matthews,
and Matthews Bros., Inc.,
an Idaho Corporation
Defendants.

OPINION
Nos. 79-4147, 78-1088

(Argued and Submitted Dec. 9, 1980)
(Decided April 6, 1981)

Appeal from the United States District
Court for the District of Idaho
Before: GOLDBERG, WRIGHT and BOOCHEVER,
Circuit Judges

Background

A tragic automobile accident provides the basis for this diversity action. In March 1976, James W. Pierce, Jr. was killed when the tractor-trailer he was driving collided with a pick-up truck owned by appellee Matthews Brothers, Inc., and occupied by appellees John E. Fairchild and J. Scott Matthews.[1] Pierce's wife and daughter brought a wrongful death suit against these three appellees.[2] The jury returned a special verdict in favor of these plain-

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[1]The jury determined that John Fairchild was driving the pick-up truck "with the permission of J. Scott Matthews and to serve a purpose, benefit or advantage of J. Scott Matthews." Record at 277, 282. Both Scott Matthews and John Fairchild were therefore held liable for Fairchild's negligent act. Id. at 284-85.

[2]This action was consolidated with the damage suit brought by the owner of the tractor-trailer, Memphis White Leasing, Inc.

tiffs, Elizabeth and Merry Christine Pierce, in the amount of $75,000. As part of this verdict, the jury found that defendant Fairchild had been negligent and that the decedent had not been contributorily negligent. The jury also found that the pick-up truck had not been used with the express or implied permission of Matthews Brothers, Inc. at the time of the accident, and thus absolved the vehicle's owner from liability. The district judge entered judgment pursuant to the jury's verdict,[3] and the Pierces brought this appeal, contesting (1) the finding that Matthews Brothers, Inc. was not liable, and (2) the size of the damage award.

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[3]It was agreed by stipulation prior to trial that the damage to plaintiff Memphis White Leasing, Inc. was $11,487.96, and a judgment in that amount was entered in favor of the leasing company. Record at 285.

I. THE PERMISSION ISSUE

[1] Idaho law, by which we are bound in this diversity case, provides that

> Every owner of a motor vehicle is liable and responsible for the death or injury to a person or property resulting from negligence in the operation of such motor vehicle. . . by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

Idaho Code § 49-1404. "Permission" to use a motor vehicle is a broad term, and the permittee need not drive the car himself in order for it to be operated with the permission of the owner, as long as it is operated with the permission -- and for the benefit -- of the permittee. Butterfield v. Western Casualty & Surety Co., 83 Idaho 79, 357 P.2d 944 (1960). For example, if parents give their child permission to use the family car, and the child allows a third person to drive the car, the parents are liable as owners whose vehicle is operat-

ed with permission. See Farm Bureau Mutual Insurance Co. v. Hmelevsky, 97 Idaho 46, 539 P.2d 598 (1975); Butterfield, supra. Indeed, even if the child is given instructions that no one else is to drive the car, the parents are still liable for damage caused by a third person who drives the car with the child's permission. Hmelevsky, supra, 539 P.2d at 602-03.[4]

In the case at bar, the jury found that John Fairchild was driving the pick-up

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[4]Although Butterfield, supra and Hmelevsky, supra, define "permission with regard to Idaho's Motor Vehicle Safety Responsibility Act, and not with regard to the motor vehicle statute at issue in the case at bar, there is no reason to believe that "permission" should be defined differently under two of the same state's motor vehicle laws. Moreover, both laws seem intended to ensure public safety by fostering responsibility on the part of vehicle owners, and this rationale suggests that permission should be defined in the same way under both laws.

truck with the permission -- and for the benefit -- of Scott Matthews. Hence, if Scott Matthews was using the truck with the express or implied permission of its owner -- Matthews Brothers, In. -- section 49-1404 would make the owner responsible for the damage caused by John Fairchild's negligence. However, the jury found that Scott Matthews had no such permission. Appellants argue that this finding was not supported by the record, and that the evidence of permission was clear and unequivocal. The issue is whether the evidence was sufficient to have warranted submission of the case to the jury, or whether the court should have granted plaintiff's motion for a directed verdict on the permission issue.

[2,3] A directed verdict in favor of a plaintiff is to be granted only if all the evidence presented at trial had but one interpretation -- in favor of liabil-

ity. United California Bank v. THC Financial Corp. 557 F.2d 1351 (9th Cir. 1977); Juhnke v. EIG Corp., 444 F.2d 1323, 1325 (9th Cir. 1971). In a formulation of the directed verdict standard quoted favorably by the Ninth Circuit, the Fifth Circuit has held that a directed verdict is warranted only if "reasonable men could not arrive at a contrary verdict." Boeing v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc), quoted in United California Bank, supra. Since in the case at bar we are faced with a jury verdict absolving the vehicle owner from liability, we are indeed hesitant to find that the trial judge should have granted a directed verdict in favor of liability. However, after a close and careful reading of the record, we cannot in good conscience conclude that the jury's verdict was supported by any reading or interpretation of the evidence. In other words, we believe that a consideration of

the evidence presented at trial compels the inescapable conclusion that express or implied permission to use the Matthews Brothers' pick-up truck was indeed given to Scott Matthews, and that "reasonable men could not arrive at a contrary verdict." See Boeing, supra. Hence we hold that plaintiffs should have been granted a directed verdict on the permission issue, and that the district court abused its discretion in refusing to do so.

On the date of the accident, the stockholders in Matthews Brothers, Inc., consisted solely of Scott Matthews' father, uncle, and grandmother. Trial Transcript at 275, 1023. It is clear from the trial testimony that Scott Matthews often drove vehicles owned by hi father and the corporation. See, e.g., id. at 281, 334-35, 386. Indeed, Scott told numerous individuals that the Matthews Brothers' pick-up truck involved in the accident was purchased for him, and referred to it as his

truck. See e.g., id. at 230-31, 318, 914. At the time of the accident, it appears that Scott had access to no vehicles other than those owned by his father or the corporation, since he did not own a vehicle in working order. Id. at 118-20, 1037-38. In fact, the evidence clearly proved that Scott had driven the truck extensively on the day of and the day before the accident. Id. at 120-21, 136-44, 161-75.

Moreover, Scott's father and uncle noted that the truck was bought to feed the corporation's cattle. Id. at 1011, 1089. Scott used the truck to feed cattle owned by Matthews Brothers. Id. at 136-37, 242. Robert Manning, the person who fed the cattle and was therefore in charge of the truck during feeding, id. at 271, 1014, 1042-43, knew that Scott had the truck on the day of the accident and did not attempt to take

it away from him or put any restrictions on its use. Id. at 253-73.[5]

Balanced against this weighty evidence of at least implicit permission to use the company truck are the bald assertions of interested parties, many of which directly contradicted testimony given at earlier depositions, that Scott was forbidden from using company vehicles. See, e.g., Trial Transcript at 295-95, 1091-92. Even if one were to accept these assertions as true -- as was well within the jury' prerogative -- they could not out-

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[5]The permissible inferences under Idaho law lend support to the conclusion that the pick-up truck was used with permission. For example, a close family relationship between the owner of a vehicle and the person using it may give rise to an inference of permission. See Eckeld v. Johnson, 96 Idaho 264, 526 P.2d 1100 (1974). Permission may also be inferred from leaving an unattended vehicle with the keys in the ignition, see Steele v. Nagel, 89 Idaho 522, 406 P.2d 805 (1965), and this was the usual practice with regard to the pick-up truck in the case at bar. Trial Transcript at 305, 1081.

weigh the substantial and convincing evidence of implicit permission. The fact that an owner verbally forbade someone from using a vehicle with the understanding that he could use it anyway cannot operate to enable the owner to escape liability under Idaho Code § 49-1404. When conclusive evidence of implicit permission undercuts even an express prohibition, section 49-1404 is satisfied and the owner may be held liable for injuries and damage resulting from the vehicle's operation.

In light of the above analysis, and in light of a painfully careful reading of the record as a whole, we are firmly convinced that Scott Matthews was given implicit permission to use the pick-up truck, and that reasonable men could not differ as to this conclusion. We do not attempt to surmise why the jury found to the contrary. We simply note that plaintiffs have met the stringent standards

for a directed verdict on the permission issue, and that the trial court therefore abused its discretion by refusing to grant plaintiffs' directed verdict motion.

II. THE DAMAGE AWARD

[4] Plaintiffs claim that the trial court erred in refusing to allow the jury to consider an award of punitive damages in this case. At the time this case was tried, it was unclear whether punitive damages were permissible in a wrongful death action under Idaho law. However, a recent decision by the Idaho Supreme Court has settled the issue. In Gavica v. Hanson, 101 Idaho 58, 608 P.2d 861 (1980), the Court held that "our wrongful death statute, as interpreted, allows for punitive damage awards." Hence we must

remand for a new trial on the punitive damage issue.[6]

[5] Plaintiffs also claim that the trial judge erred in refusing to grant their motion for a new trial on damages in light of what they feel was an unjustly small judgment. A judge's denial of a motion for a new trial on damages in a case tried before a jury may be reversed only for an abuse of discretion. See Felder v. United States, 543 F.2d 657,

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[6]In conducting the new trial, the district court may find helpful another recent decision by the Idaho Supreme Court. In Hatfield v. Max Rouse & Sons Northwest, 100 Idaho 840, 606 P.2d 944 (1980), the court discussed the limits of punitive damage awards under Idaho law, and language from Hatfield may prove helpful in deciding whether punitive damages should be assessed in the case at bar. The court will also have to determine whether sufficient evidence is presented to justify submitting to the jury the issue of whether the corporate defendant may be liable for punitive damages. See Boise Dodge, Inc. v. Clark, 92 Idaho 902, 905-06, 453 P.2d 551, 554-55 (1969).

664-65 & n.6 (9th Cir. 1976); Merritt-Chapman & Scott Corp. v. Frazier, 289 F.2d 849 (9th Cir., cert. denied, 368 U.S. 835, 82 S.Ct. 60, 7 L.Ed.2d 36 (1961); Stafford v. Perini Corp., 475 F.2d 507, 512 (1st Cir. 1973); Traylor v. United States, 396 F.2d 837 (6th Cir. 1968). Such a finding is to be made only in "shocking" or "exceptional" circumstances, see Estes v. Southern Pacific Transportation Co., 598 F.2d 1195, 1200 (5th Cir. 1979); Brown v. Louisiana & Arkansas Ry., 429 F.2d 1265 (5th Cir. 1970), such as where the award is substantially less than the unquestionably proven damages. See Traylor, supra, 396 F.2d at 839 & n.1. In such a case, the appellate court is faced with a double hurdle: it must first find that the jury's damage award is inconsistent with the evidence, and then find that the trial court abused its discretion in not setting it aside. See Felder, supra, 543

F.2d at 664-65 & n.6. However, the two hurdles have been overcome in past cases, and district courts have been reversed for abusing their discretion in refusing to grant a new trial on damages after an unjust jury verdict. See, e.g., Lester v. Dunn, 475 F.2d 983 (D.C.Cit. 1973); Vidrine v. Kansas City Southern Ry., 466 F.2d 1217, 1266 (5th Cir. 1972); Devine v. Patteson, 242 F.2d 828 (6th Cir.), cert. denied, 355 U.S. 821, 78 S.Ct. 27, 2 L.Ed.2d 36 (1957).

[6] In the case at bar, the jury awarded plaintiffs $75,000 for the death of James Pierce. The uncontradicted evidence at trial showed that the decedent was 36 years old and in good health when killed. He left surviving a wife and fifteen year-old child. Trial Transcript at 597, 668-701. He had a life expectancy of about 36 more years, and could have expected to continue working for about 29 more years had his life not

been tragically cut short. Id. at 609-11. The decedent earned about $16,000 in each of the years 1973 and 1974, and in 1975, the last year of his life, he earned about $18,000. Id. at 608; Plaintiffs' Exhibits 65, 66, 128. Taking only lost wages into account, and not even considering cost of living increases or other salary raises which might be expected, a simple exercise in multiplication reveals the gross inadequacy of a $75,000 award. Even after one takes into account the taxes decedent would have had to pay, the amount which decedent would have himself consumed, and the present value discount of future earnings, it is clear that the jury's award was manifestly unjust. Indeed, the $75,000 award represents little more than four years of the decedent's salary at its 1975 rate. In light of plaintiffs' economist's calculation that the lost wages from the time of the accident to the time of trial were

alone over $58,000, Trial Transcript at 615, the $75,000 award seems miserly at best.

Moreover, when one takes into account such factors as potential retirement benefits, lost inheritance,[7] and the loss of services, society and companion-

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[7]The trial court did not instruct the jury that potential lost inheritance was recoverable. See Trial Transcript at 1130-35. However, in light of the fact that the Idaho Supreme Court has found that state's wrongful death law to be "as liberal as any we have examined," Hepp v. Ader, 64 Idaho 240, 130 P.2d 859 (1942); see Meissner v. Smith, 94 Idaho 563, 494 P.2d 567 (1972), and in light of the fact that other courts have allowed the recovery of potential lost inheritance, see, e.g., Martin v. Atlantic Coast Line R.R., 268 F.2d 397 (5th Cir. 1959); Platis v. United States, 288 F.Supp.254, 275 (D.Utah 1968), aff'd, 409 F.2d 1009 (10th Cir. 1969); Salinas v. Kahn, 2 Ariz.App. 181, 407 P.2d 120 (Ariz.Ct.App.), modified on other grounds, 2 Ariz.App. 348, 409 P.2d 64 (Ariz.Ct.App. 1965); Reynolds v. Willis, 58 Del. 368, 209 A.2d 760 (1965), we believe that the Idaho courts would allow the recovery of potential lost inheritance in a wrongful death case.

ship, the Scrooge-like penuriousness of the jury's award becomes even more astonishing. The judgment in the case at bar is substantially less then the unquestionably proven damages, and the trial judge's refusal to grant a new trial on damages was indeed an abuse of discretion. See supra, slip op. pages 1142-1143, pages _____. We are therefore compelled to reverse the trial court's decision and to order a new trial on damages.

III. CONCLUSION*

It is the exceptional case in which the jury's verdict is found to be clearly contrary to the evidence. The case at bar is doubly exceptional, since both the jury's assessment of damages and its

---

*Because we grant the relief sought, we need not consider the remaining arguments raised by appellants.

verdict on the permission issue are unsupported by the record. We make no attempt to guess why the jury absolved Matthews Brothers from liability or why it went to the bargain basement in order to calculate damages. We merely hold that a directed verdict should have been given on the permission issue, since the only reasonable interpretation of the evidence was in favor of liability, and that a new trial on damages should have been granted, since the jury's award was manifestly unjust. Moreover, because recent Idaho case law holds that punitive damages may be awarded in a wrongful death action, the district court must determine whether such damages are proper here.

The jury is at the very heart of our legal system, and great deference must be paid to its verdicts. However, the appellate courts are more than mere rubber stamps, and where a jury verdict is manifestly erroneous, unreasonable, and un-

just, it must not be allowed to stand. We therefore reverse the trial court's refusal to grant a directed verdict on the permission issue, and its refusal to grant a new trial on damages. We remand for an order by the district court holding Matthews Brothers, Inc. liable under Idaho Code § 49-1404. We also remand for a new trial on damages, during which the court should permit the jury to consider whatever damages Idaho's wrongful death law allows, including punitive damages and lost inheritance.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIZABETH PIERCE, Individually and as Guardian ad Litem for MERRY CHRISTINE PIERCE, Plaintiffs-Appellants,	)	No. 79-4147 Civ.No. 1-76-109
v.	)	
JOHN E. FAIRCHILD, J. SCOTT MATTHEWS and MATTHEWS BROS., INC., an Idaho corporation, Defendants-Appellees.	)	Consolidated with Civ. No. 78-1088
AND	)	
MEMPHIS WHITE LEASING, INC., a Tennessee corporation, Plaintiff,	)	
v.	)	
JOHN E. FAIRCHILD: J. SCOTT MATTHEWS; AND MATTHEWS BROS., INC., an Idaho corporation, Defendants.	)	O R D E R

Before: GOLDBERG,* WRIGHT and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition

for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing is rejected.

---

*Honorable Irving L. Coldberg, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

JUDGMENT

United States Court of Appeals

FOR THE NINTH CIRCUIT

U. S. DISTRICT COURT
DISTRICT OF IDAHO
Filed at 8:30 A.M.

SEP 18 1981

JERRY L. [illegible], Clerk
By [illegible] Deputy

ELIZABETH PIERCE, etc., et al.,
Plaintiffs-Appellants,
vs.
JOHN E. FAIRCHILD, J. SCOTT MATTHEWS and MATTHEWS BROS., INC., etc.,
Defendants-Appellees.

MEMPHIS WHITE LEASING, INC., etc.,
Plaintiff,
vs.
JOHN E. FAIRCHILD, et al.,
Defendants.

No. 79-4147

DC CV 76-109 RM

APPEAL from the United States District Court for the District of IDAHO (Boise)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of IDAHO (Boise)

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

A TRUE COPY
ATTEST
Richard H. Smith
17 SEP 1981
Clerk of Court
by: Oscar Vogle
Deputy Clerk

April 6, 1981

Filed and entered

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIZABETH PIERCE, Individually and as Guardian ad Litem for MERRY CHRISTINE PIERCE, Plaintiffs-Appellants,	No. 79-4147 CIVIL CASE NO. 1-76-109
vs.	
JOHN E. FAIRCHILD, J. SCOTT MATTHEWS and MATTHEWS BROS., INC., an Idaho corporation, Defendants-Appellees.	CONSOLIDATED WITH CIVIL CASE NO. 78-1088
AND	
MEMPHIS WHITE LEASING, INC., a Tennessee corporation, Plaintiff,	
vs.	
JOHN E. FAIRCHILD: J. SCOTT MATTHEWS; AND MATTHEWS BROS., INC., an Idaho corporation, Defendants.	ORDER

Before: GOLDBERG,* WRIGHT and BOOCHEVER, Circuit Judges.

The opinion heretofore filed on April 6, 1981 is withdrawn as an opinion

for publication. It will be refiled as a Memorandum and will not be published.

---

*Senior United States Circuit Judge for the Fifth Circuit.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

MEMPHIS WHITE LEASING, INC., a Tennessee corporation, Plaintiff, vs. JOHN E. FAIRCHILD; J. SCOTT MATTHEWS; and MATTHEWS BROS., INC., Idaho corporation Defendants.	Civil No. 78-1088 JUDGMENT ON JURY VERDICT
ELIZABETH PIERCE, Individually and as Guardian ad Litem for MERRY CHRISTINE PIERCE, Plaintiffs, vs. JOHN E. FAIRCHILD; J. SCOTT MATTHEWS; and MATTHEWS BROS., INC., an Idaho corporation, Defendants, and JOHN E. FAIRCHILD, Third Party Plaintiff, vs. J. SCOTT MATTHEWS, and MATTHEWS BROS., INC., an Idaho corporation, Third Party Defendants	Civil No. 1-76-09

This matter came on for trial before a jury on October 30, 1978, and continued from day to day until November 9, 1978.

All parties were present and represented by counsel of record. Oral and documentary evidence was received; counsel addressed the jury in closing arguments; and the Court instructed the jury as to the applicable law.

The jury returned a unanimous verdict by way of a Special Verdict consisting of interrogatories.

The jury found:

1. That the vehicle owned by the defendant Matthews Bros., Inc., was being driven without the express or implied consent of the corporation.

2. That the defendant and third-party plaintiff John E. Fairchild was driving the vehicle owned by the defendant Matthews Bros., Inc., at the time of the accident.

3. That the defendant and third party plaintiff John E. Fairchild in so driving the said vehicle was negligent and that his negligence was the proximate cause of the death of James W. Pierce and

the damage to the vehicle owned by the plaintiff Memphis White Leasing, Inc.

4. That the defendant and third-party plaintiff John E. Fairchild was driving the vehicle owned by the defendant Matthews Bros., Inc., with the permission of J. Scott Matthews to serve a purpose, benefit, or advantage of J. Scott Matthews.

5. That James W. Pierce, the decedent, was not negligent.

6. That the plaintiffs Elizabeth Pierce and Merry Christine Pierce suffered damage in the sum of seventy-five thousand ($75,000.00) dollars.

By Stipulation, it was agreed prior to trial that damage to the plaintiff Memphis White Leasing, Inc., was the sum of $11,487.96.

Based on the verdict of the jury and the records and files of this case, the Court orders, adjudges and decrees as follows:

1. Plaintiff Memphis White Leasing, Inc., is granted judgment against the defendants John W. Fairchild and J. Scott Matthews in the sum of $11,487.96, together with costs.

2. That the Complaint of the plaintiff Memphis White Leasing, Inc., against the defendant Matthews Bros., Inc., is dismissed with costs to said defendant.

3. That the plaintiffs Elizabeth Pierce and Merry Christine Pierce are granted judgment against the defendants John E. Fairchild and J. Scott Matthews in the sum of $75,000.00 together with costs.

4. That the Complaint of the plaintiffs Elizabeth Pierce and Merry Christine Pierce against the defendant Matthews Bros., Inc., is dismissed with costs to said defendants.

5. That the Third-Party Complaint of John E. Fairchild against the third-

party defendants J. Scott Matthews and Matthews Bros., Inc., is dismissed with costs to said defendants.

/s/ Ray McNichols
RAY McNICHOLS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF IDAHO

MEMPHIS WHITE LEASING, INC., a Tennessee corporation, Plaintiff and Counterdefendant, v. JOHN E. FAIRCHILD; J. SCOTT MATTHEWS; and MATTHEWS BROS., INC., Idaho corporation Defendants.	Civil No. 78-1088
and JOHN E. FAIRCHILD, Counterclaimant.	ORDER DENYING ALTERNATIVE MOTION OF THE PLAINTIFFS, ELIZABETH PIERCE AND MERRY CHRISTINE PIERCE, FOR ENTRY OF JUDGMENT N.O.V. OR ALTERNATIVELY FOR A NEW TRIAL
ELIZABETH PIERCE, Individually and as Guardian ad Litem for MERRY CHRISTINE PIERCE, Plaintiffs, v. JOHN E. FAIRCHILD; J. SCOTT MATTHEWS; and MATTHEWS BROS., INC., an Idaho corporation, Defendants, and JOHN E. FAIRCHILD, Third Party Plaintiff, v. J. SCOTT MATTHEWS, and MATTHEWS BROS., INC., an Idaho corporation, Third Party Defendants	Civil No. 1-76-109

On November 13, 1978, the Court entered a Judgment based on a Jury Verdict adverse to the above-named plaintiffs. Said plaintiffs now make a timly Motion for Judgment N.O.V. and/or Alternative for Allowance of a New Trial. The Motion is based on alleged errors in the admission of evidence, on the instructions given to the Jury, and on the contention that some or all of the Judgment is contrary to the weight of the evidence.

The Court has carefully considered the Motion, the underlying showing, and has reviewed the facts of the case. The Court finds that the motions are without merit.

IT IS THEREFORE ORDERED:

That the Alternative Motion of the above-named plaintiffs for Judgment

N.O.V. and/or for Allowance of a New Trial be, and the same hereby is, DENIED.

/s/ Ray McNichols
RAY McNICHOLS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Opposition

Office - Supreme Court, U.S.
FILED
JAN 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1204

In The

Supreme Court of the United States

October Term, 1981

ELIZABETH PIERCE, Individually and as Guardian ad Litem for MERRY CHRISTINE PIERCE,
Respondents,

vs.

JOHN E. FAIRCHILD, J. SCOTT MATTHEWS and MATTHEWS BROS., INC., an Idaho corporation,
Petitioners.

and

MEMPHIS WHITE LEASING, INC., a Tennessee corporation,
Plaintiff,

vs.

JOHN E. FAIRCHILD, J. SCOTT MATTHEWS and MATTHEWS BROS., INC., an Idaho corporation,
Defendants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C. HEPWORTH
Counsel for Respondents

Office and Post Office Address:

HEPWORTH, NUNGESTER & FELTON
133 Shoshone Street North
P. O. Box 389
Twin Falls, Idaho 83301
(208) 734-7510

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Pages

Points and Authorities ii

Statement of Case:

Background 1

Factual Evidence 2

Argument:

I. Review by Writ of Certiorari is not appropriate in the case at bar. 9

a. Permissive Use 11

b. Punitive Damages 12

c. Compensatory Damages 12

d. Loss of Inheritance 13

Conclusion 14

Appendix A ..... App. 1

Appendix B ..... App. 12

Appendix C ..... App. 14

Appendix D ..... App. 16

Appendix E ..... App. 17

Appendix F ..... App. 20

TABLE OF POINTS AND AUTHORITIES

CASES:

	Pages
American Constr. Co. v. Jacksonville, T & K W. R. Co., 148 U. S. 372 (1893)	9
Erie R. Co. v. Tompkins, 304 U. S. 64 (1938)	12, 13
Felder v. United States, 543 F. 2d 657, 664-65 & n. 6 (9th Cir. 1976)	12
Fields v. United States, 205 U. S. 292 (1907)	9
Forsyth v. Hammond, 166 U. S. 506 (1897)	9
Gavica v. Hanson, 101 Idaho 58, 608 P. 2d 861 (1980)	11
General Talking Picture Corp. v. Western Electric Co., 304 U. S. 175 (1938)	10
Hallmark Industry v. Reynolds Metal Co., 489 F. 2d 8 (9th Cir. 1973), cert. denied, 417 U. S. 932 (1974)	11
Hamilton Brown Shoe Co. v. Wolf Bros. & Co., 240 U. S. 251 (1916)	9
Re Lau Ow Bew, 141 U. S. 583 (1891)	9
Lau Ow Bew v. United States, 144 U. S. 47 (1892)	9
Magnum Import Co. v. Coty, 262 U. S. 159 (1923)	9
Merritt-Chapman & Scott Corp. v. Frazier, 289 F. 2d 849 (9th Cir. 1961); cert. denied, 368 U. S. 835	12
NLRB v. Pittsburgh S. S. Co., 340 U. S. 498 (1951)	9
Ohio ex rel. Seney v. Swift & Co., 260 U. S. 146 (1922)	9

POINTS AND AUTHORITIES—Continued

Pages

Rahlin v. New York Life Ins. Co., 304 U. S. 202 (1938) 10

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U. S. 70 (1955) 10

Schmeding v. American Farmers Mutual Insurance Co., 138 F. Supp. 167, 181 (D. Neb. 1955) 13

Stafford v. Perini Corp., 475 F. 2d 507, 512 (1st Cir. 1973) 12

Traylor v. United States, 396 F. 2d 837 (6th Cir. 1968) 12

United California Bank v. THC Financial Corp., 557 F. 2d 1351 (9th Cir. 1977) 11

United States v. Johnson, 268 U. S. 220 (1925) 10

Ward v. Hobart Mfg. Co., 450 F. 2d 1176, 1180 (5th Cir. 1971) 13

Re Woods, 43 U. S. 262 (1892) 9

STATUTES AND RULES:

Idaho Code § 5-311 3, 9

Idaho Code § 49-1404 2, 3, 9

United States Supreme Court Rule 17 9, 10, 12, 14

No. _____

In The

Supreme Court of the United States

October Term, 1981

ELIZABETH PIERCE, Individually and as Guardian ad Litem for MERRY CHRISTINE PIERCE,

Respondents,

vs.

JOHN E. FAIRCHILD, J. SCOTT MATTHEWS and MATTHEWS BROS., INC., an Idaho corporation,

Petitioners.

and

MEMPHIS WHITE LEASING, INC., a Tennessee corporation,

Plaintiff,

vs.

JOHN E. FAIRCHILD, J. SCOTT MATTHEWS and MATTHEWS BROS., INC., an Idaho corporation,

Defendants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF CASE

1. Background.

This wrongful death action was tried to a jury in United States District Court at Boise, Idaho, on the basis of diversity jurisdiction.

Respondents are the surviving widow and daughter, respectively, of James W. Pierce, Jr., deceased. Decedent was fatally injured in an automobile mishap near

Twin Falls, Idaho, on March 24, 1976, when his tractor/trailer was struck by a pickup truck owned by petitioners Matthews Bros., Inc., and occupied at the time of the mishap by John E. Fairchild and J. Scott Matthews. It was not known who was driving the pickup at the time of the mishap and respondents named both John E. Fairchild and J. Scott Matthews as defendants in addition to the action against Matthews Bros., Inc., as owners of the vehicle.

Petitioners denied that J. Scott Matthews and John E. Fairchild had express or implied permission from Matthews Bros., Inc. to operate the pickup. At the close of plaintiffs' case, respondents moved for a directed verdict on the permissive use issue, which was denied by the District Court. The jury awarded respondents $75,000 in damages and found that John E. Fairchild was driving the vehicle with the permission of J. Scott Matthews and to serve a purpose, benefit and advantage of J. Scott Matthews. The jury, however, found that the vehicle's use was without the permission of Matthews Bros., Inc.

Respondents filed timely motions for a new trial and judgment notwithstanding the verdict, which motions were denied. On appeal to the United States Court of Appeals for the Ninth Circuit, the judgment below was reversed and the Court held as follows:

(1) The district court abused its discretion in refusing to grant respondents' motion for a directed verdict on the permissive use issue pursuant to *I.C.* §49-1404 (Appendix "A," App. 5 through App. 7).

(2) The district court erred in ruling that punitive damages could not be awarded under Idaho's

wrongful death statute, *I. C.* § 5-311 (Appendix "A," App. 8).

(3) The district court erred in not instructing the jury that loss of inheritance is recoverable under Idaho's wrongful death statute, *I. C.* § 5-311 (Appendix "A," App. 9-10).

(4) The district court abused its discretion in refusing to grant respondents' motion for a new trial on the issue of damages (Appendix "A," App. 10).

Petitioner Matthews Bros., Inc. was held liable for the permissive use of their vehicle pursuant to *Idaho Code* § 49-1404, and the action was remanded to the district court for a new trial on the issue of damages, including punitive damages and lost inheritance (Appendix "A," App. 11).

Petitioners then moved for a rehearing which was denied *en banc* (Appendix "B," App. 12 and App. 13). This was followed by the instant petition for writ of certiorari to this Court.

2. Factual Evidence.

Evidence introduced at the trial on the issues of permissive use, punitive damages, and compensatory damages was as follows.

(a) Permissive Use.

Matthews Bros. conducts a large farming and ranching operation (Tr., p. 276, l. 2). It is a closely-held family corporation now owned by two brothers, Ennis Matthews and Maurice Matthews (Tr., p. 275, l. 12). Ennis Matthews is Matthews' father and the manager of Matthews Bros. (Tr. 104, l. 18 and p. 1042, l. 8). J. Scott Matthews is an only son (Tr. p. 1048, l. 22; p. 1049, l. 6).

The pickup involved in the collision was a 1966 GMC four-wheel drive pickup. It was delivered to Matthews Bros. on March 22, 1976 (Tr., p. 1011, ll. 6-25). At the time of its purchase, J. Scott Matthews was helping his brother-in-law, Robert H. Manning, feed cattle owned by Manning and Matthews Bros. (Tr., p. 240, l. 17). This fact was known by Ennis Matthews (Tr., p. 303, l. 4). J. Scott Matthews told numerous individuals that the pickup was purchased for his use (Tr., p. 129, l. 25; p. 230, l. 8; p. 231, l. 12 and p. 318, l. 11). Matthews Bros. had furnished or provided vehicles for the personal use of family members in the past (Tr., p. 281, p. 1024, l. 7). At the time this vehicle was purchased, Ennis Matthews knew that his son, J. Scott Matthews, did not have a vehicle which was operational (Tr., p. 311, l. 2). Maurice Matthews also admitted that he knew his nephew had no available vehicle other than a corporate vehicle when J. Scott Matthews went to lunch on the morning of March 24, 1976 (Tr., p. 1037, l. 5 through 1038, l. 4). The keys to corporate vehicles were left in the ignition when parked (Tr., p. 305 and p. 1081). The keys were in the pickup when J. Scott Matthews drove it away from the Matthews Brothers ranch (Tr., p. 141, l. 15). Earlier in the spring of 1976, J. Scott Matthews had "used" a corporate truck for a few days without first obtaining express permissive use, with no adverse consequences from Matthews Bros. (Tr., p. 294, l. 17 and p. 1010).

On March 23, 1976, the pickup was used by J. Scott Matthews for feeding (Tr., p. 244, l. 11). Feeding was finished before the noon meal. Later in the day, J. Scott Matthews took the pickup, in which the keys had been left, and drove to Burley, Idaho, where he stayed overnight

with a girlfriend (Tr., p. 141, l. 15 through p. 142, l. 3). On March 24, 1976, the morning of the accident, J. Scott Matthews returned to the Matthew Brothers' ranch from Burley, Idaho (Tr., p. 142, l. 3). Manning had gone to the ranch headquarters to get the pickup and had not found it. J. Scott Matthews was late for feeding and met Manning on the highway by Matthews Brothers' ranch (Tr., p. 253, l. 24). At Manning's direction, and upon Matthews's request, J. Scott Matthews drove a friend to Oakley, and returned to help finish feeding (Tr., p. 253, l. 3 through l. 20). After feeding, J. Scott Matthews again left Manning and went to Oakley where he started the partying which culminated in the death of James W. Pierce (Tr., p. 254, l. 25 through p. 255, l. 10).

After J. Scott Matthews left the Matthews Brothers' ranch, Manning met Ennis and Maurice Matthews. They asked where J. Scott Matthews was and then went to dinner (Tr., p. 256, l. 15). Ennis Matthews knew that the pickup had been used to feed cattle that morning (Tr., p. 305). Maurice Matthews knew that J. Scott Matthews had gone to lunch (Tr., p. 1037, l. 1) and that he had no vehicle available except corporate vehicles (Tr., p. 1037, l. 5 through p. 1038, l. 4). Even after acquiring this knowledge, at approximately 12:00 p.m., on March 24, 1976, neither Ennis Matthews nor Maurice Matthews made any attempt to retrieve the pickup from J. Scott Matthews. J. Scott Matthews had possession of the pickup from approximately 12:00 p.m., on March 23, 1976, until the time of the accident at approximately 8:30 p.m. on March 24, 1976, a period of over 32 hours (Tr., p. 141, l. 20).

See also, the statement of facts set forth by the Court of Appeals (Appendix "A," App. 5 through App. 7).

(b) Punitive Damages.

J. Scott Matthews admitted consuming two beers (24 oz.) at approximately noon on March 24, 1976 (Tr., p. 151), about one-half a beer at approximately 1:00 p.m. (Tr., p. 152), and continuing to Rock Creek Saloon where he drank one beer and then consumed approximately ¾ of another beer over the next hour (Tr., p. 154). At Twin Falls, Idaho, at Shyrlene Keene's apartment, he had but one beer at about 5:00 p.m. and another at about 6:00 p.m. (Tr., pp. 154 and 155). He also admitted smoking marijuana between that time and the accident (Tr., pp. 156 and 157). Fairchild had joined J. Scott Matthews at the Oakley cafe and had been with him all afternoon and evening. J. Scott Matthews and Shyrline Sellers testified that Fairchild had also smoked marijuana (Tr., p. 161, l. 6 and Tr., p. 498, l. 1).

Blood alcohol tests taken after the accident showed that Fairchild had a blood-alcohol content of .08 and that J. Scott Matthews had a blood-alcohol content of .06 (Tr., p. 72, l. 18 and l. 25). Mr. Beals, a qualified expert in clinical chemistry, testified that at the time of an accident, which was an hour or so before the blood was drawn, Fairchild's blood-alcohol content would have been .10 (Tr., p. 425, l. 15) and J. Scott Matthews' blood-alcohol content would have been .08 (Tr., p. 422, l. 3). The evidence showed that the combination of marijuana and alcohol was explained as akin to adding one plus one and producing three, in that the effect of each alone is enhanced in combination (Tr., p. 424, l. 24). The blood alcohol test did not, however, measure the added effects of marijuana on a person's system (Tr., p. 77, l. 5).

Christina Matsau Cerlino testified that Fairchild and J. Scott Matthews were both drunk when they left the

apartment (Tr., p. 460, l. 19) and that they were both pretty drunk (Tr., p. 469, l. 24).

Shyrline Sellers tried to persuade Fairchild and J. Scott Matthews not to leave her apartment because she did not think they should be driving (Tr., p. 479, l. 8), and thought that neither Fairchild nor Matthews were in any shape to be driving (Tr., p. 498, l. 13). She asked them to stay, and have more coffee or something to sober up a little bit before they left (Tr., p. 970, l. 4). J. Scott Matthews recognized his inability to drive, but accepted Fairchild's assurance that Fairchild was able to drive (Tr., p. 169, l. 15).

The evidence also showed that there was a serious question as to whether the lights of the Matthews Brothers' pickup were activated. Stan Soares, who stopped at the stop sign on the opposite side of the intersection from where the pickup was approaching, did not see the pickup's headlights (Tr., p. 84, l. 13 through l. 22). Visibility was good (Tr., p. 83, l. 19), and he had seen the decedent's truck approaching over a quarter of a mile from the intersection (Tr., p. 83, l. 4 through l. 16). Dr. John Habberstad, an accident reconstruction expert, was also of the opinion that the lights had not been activated because the light filament was not burned out, even though the glass of the headlight was broken (Tr., p. 532, l. 19 through p. 533, l. 10). Matthews did not recall the pickup lights being activated (Tr., p. 213, l. 10).

(c) Compensatory damages.

At the time of his death, James W. Pierce was 36 years old, having been born on November 10, 1939 (Tr., p. 597, l. 2 and l. 11). Elizabeth Pierce, his wife, was 34 years

old, having been born April 30, 1941 (Tr., p. 597, l. 4 and l. 13). Merry Christine Pierce was 15 years old, having been born December 23, 1960 (Tr., p. 597, l. 9). Mr. Pierce had been a truck driver for 14 to 15 years, and belonged to a union (Tr., p. 597, l. 15). Tax returns for the Pierces showed Mr. Pierce's income to be as follows: 1973—$15,966; 1974—$16,613; and 1975—$18,036 (Tr., p. 608, l. 11, exhibits 128, 65 and 66).

Stuart Neffeler, an expert witness in the field of economics, testified that Mr. Pierce had a life expectancy at the time of his death of 36.6 years (Tr., p. 611, l. 10), James W. Pierce was in excellent health at the time of his death (Tr., p. 709, l. 14). Mr. Neffeler computed the economic loss of the Pierces to the date of trial, which totalled $55,400 (Tr., p. 617, l. 15). He then projected future economic losses, taking into consideration inflation and reduction to present value, which totalled $581,000 (Tr., p. 624, l. 22 through p. 646, l. 12), for a total of $636,400.00 in economic loss. These figures did not take into consideration the loss of companionship, society and other elements of compensable damages allowed by Idaho law (Tr., p. 646, l. 13). Mr. Neffeler's testimony was never refuted.

The evidence also showed that respondents' family was closely knit. Mr. and Mrs. Pierce were very close and loving towards each other (Tr., p. 701, l. 1 and Tr., p. 711, l. 14), and they had a happy marriage (Tr., p. 711, l. 13).

See also the statement of facts set forth by the Court of Appeals, which showed that the jury's award of compensatory damages was unconscionably low (Appendix "A," App. 8 through App. 10).

ARGUMENT

I.

Review by writ of certiorari is not appropriate in the case at bar.

A review by statutory writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. *United States Supreme Court Rule 17.* The case at bar involves an interpretation of Idaho's permissive use statute (*Idaho Code* § 49-1404), Idaho's wrongful death statute (*Idaho Code* § 5-311), and damages recoverable thereunder; it does not involve special, novel, nor important considerations within the meaning of *United States Supreme Court Rule 17.*

This Court has repeatedly held that review by certiorari is to be exercised sparingly and only in cases of gravity and general importance, or in order to secure uniformity of decisions. *Re Lau Ow Bew,* 141 U. S. 583 (1891); *Re Woods,* 143 U. S. 262 (1892); *Lau Ow Bew v. United States,* 144 U. S. 47 (1892); *American Constr. Co. v. Jacksonville, T & K W. R. Co.,* 148 U. S. 372 (1893); *Forsyth v. Hammond,* 166 U. S. 506 (1897); *Fields v. United States,* 205 U. S. 292 (1907); *Hamilton Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U. S. 251 (1916); *Ohio ex rel. Seney v. Swift & Co.,* 260 U. S. 146 (1922). Review by certiorari will lie for questions of importance in which it is in the public interest to have the issue resolved by the court of last resort. *Magnum Import Co. v. Coty,* 262 U. S. 159 (1923). Writs of certiorari are to be granted on questions of great importance to the public as distinguished from importance to the parties. *NLRB v. Pitts-*

burgh S. S. Co., 340 U. S. 498 (1951); *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U. S. 70 (1955). A writ of certiorari should not be granted to review evidence and discuss specific facts. *United States v. Johnson*, 268 U. S. 220 (1925); *General Talking Picture Corp. v. Western Electric Co.*, 304 U. S. 175 (1938). Conflicts among the various circuit courts of appeal regarding questions controlled by state law are not sufficient reasons for granting review by writ of certiorari, as the conflict may be merely the result of permissible differences of opinion within the respective state courts. *Rahlin v. New York Life Ins. Co.*, 304 U. S. 202 (1938).

Of the reasons listed by *United States Supreme Court Rule 17* for granting review by certiorari, only the following reason is arguably applicable:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeal * * * has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> *United States Supreme Court Rule 17.*

However, an examination of the opinion of the Court of Appeals shows it not only recognized, but also applied the accepted standards of appellate review and that the case at bar does not meet any of the requirements of *United States Supreme Court Rule 17* for review by writ of certiorari.

(a) Permissive Use.

The Ninth Circuit Court of Appeals has held that a directed verdict should be granted only when reasonable men could not arrive at a contrary conclusion. *United California Bank v. THC Financial Corp.*, 557 F. 2d 1351 (9th Cir. 1977). The same standard is followed in ruling upon a motion for judgment notwithstanding the verdict. *Hallmark Industry v. Reynolds Metals Co.*, 489 F. 2d 8 (9th Cir. 1973), *cert. denied*, 417 U. S. 932 (1974). In the case at bar, the Court of Appeals reiterated, reaffirmed, and applied these accepted standards in ruling upon the permissive use issue, noting as follows:

> We simply note that plaintiffs (respondents) have met the stringent standards for a directed verdict on the permission issue, and that the trial court therefore abused its discretion by refusing to grant plaintiffs' (respondents') directed verdict motion.
>
> Appendix "A," at App. 6-7.

Clearly, the opinion of the Court of Appeals did not deviate from accepted and usual appellate standards of review, and, therefore, the case at bar does not present a situation justifying review by certification.

(b) Punitive Damages.

The district court refused to instruct the jury on the issue of punitive damages upon the mistaken belief that punitive damages were not recoverable under Idaho's wrongful death statute. The Court of Appeals, however, noted the recent Idaho Supreme Court decision of *Gavica v. Hanson*, 101 Idaho 58, 608 P. 2d 861 (1980), which allowed punitive damages in a wrongful death action in Idaho. Based upon that decision, the Court of Appeals remanded the matter to the district court for a new trial

on the punitive damage issue. It is clear that in the instant diversity action, the district court is bound to recognize Idaho's substantive law as proclaimed by the Idaho Supreme Court, *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1938), and the Circuit Court did not deviate from accepted and usual appellate standards in remanding this issue to the district court for a new trial. Thus, review by certification is not proper on the basis of this issue.

(c) Compensatory Damages.

The Circuit Court noted that the district court's denial of respondents' motion for a new trial on the issue of sufficiency of damages would be reversed only upon a showing of an abuse of discretion (Appendix "A," App. 8). In doing so, the court adopted the accepted appellate standard of review reiterated by other circuit courts which have addressed this issue. *Felder v. United States,* 543 F. 2d 657, 664-65 & n. 6 (9th Cir. 1976); *Merritt-Chapman & Scott Corp. v. Frazier,* 289 F. 2d 849 (9th Cir. 1961); *cert. denied,* 368 U. S. 835; *Stafford v. Perini Corp.,* 475 F. 2d 507, 512 (1st Cir. 1973); *Traylor v. United States,* 396 F. 2d 837 (6th Cir. 1968). After noting the applicable standard, the Court concluded as follows:

> The judgment in the case at bar is substantially less than the unquestionably proven damages, and the trial judge's refusal to grant a new trial on damages was indeed an abuse of discretion.
>
> Appendix "A," App. 10.

It is, therefore, equally clear that the Court of Appeals did not deviate from accepted and usual appellate standards in addressing the issue of damages, and that review by writ of certification is not available to petitioners under *United States Supreme Court Rule 17.*

(d) Loss of Inheritance.

Under the principles enunciated in *Erie R. Co. v. Tompkins, supra,* the Circuit Court was bound to apply Idaho substantive law. When a state court has not addressed an issue, such as the recoverability of loss of inheritance, then the federal court is bound to determine what it reasonably would expect the state court to decide if the question had been presented. In *Schmeding v. American Farmers Mutual Insurance Co.,* 138 F. Supp. 167, 181 (D. Neb. 1955), referring to the state law which federal courts are bound to recognize under *Erie R. Co. v. Tompkins, supra,* the court said:

> That law is to be gathered from the state's statutes or the decisions of its courts where these are available, and, in areas within which neither the legislature nor the courts of the state have marked the way, by the judicial appraisal of the probable course of Nebraska's court of last resort in the light of those factors that would reasonably be expected to guide that court.

In *Ward v. Hobart Mfg. Co.,* 450 F. 2d 1176, 1180 (5th Cir. 1971), the court stated the accepted appellate standard to be followed where the district court has adopted an interpretation of state law contrary to the view held by the circuit court:

> The district court recognized that it was bound by Erie. . . . We accord proper consideration to the "rational divination" of the district court to determine what decision the Mississippi Supreme Court would reach if and when the question here presented is resolved by that court. Nevertheless, we cannot adopt the district court's view of the applicable state law if in our judgment that view is contrary to the more cogent reasoning of the best and most wide-spread authority. Otherwise appellate review in a substan-

tial number of diversity cases which come before this court would be effectively eliminated.

The Circuit Court's holding that the jury should have been instructed on the potential loss of inheritance under Idaho's wrongful death statute is supported by Idaho law. The decision comports with the accepted and usual standards followed by other appellate courts when reviewing a decision of a lower district court on an issue not yet resolved by a state's court of last resort. Review by writ of certification is, therefore, also not proper on this issue as the requirements of *United States Supreme Court Rule 17* have not been satisfied by petitioners.

CONCLUSION

This case does not meet the criteria for the issuance of a writ of certiorari as required by *United States Supreme Court Rule 17*. It involves only the interpretation of Idaho law and does not involve a situation where uniformity among the circuits will be fostered; indeed, no such uniformity is possible as the substantive law of the state will vary in each of the states according to the court of last resort. Additionally, there is nothing presented by the petition which shows that the Circuit Court failed to follow the prescribed rules of appellate review. In the words of the opinion of the Circuit Court, "appellate courts are more than mere rubber stamps, and where a jury verdict is manifestly erroneous, unreasonable, and unjust, it must not be allowed to stand." (Appendix "A," App. 11). The petition for writ of certiorari should, therefore, be denied.

DATED this 30th day of December, 1981.

Respectfully submitted,
HEPWORTH, NUNGESTER & FELTON
By JOHN C. HEPWORTH
Attorneys for Respondents

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Elizabeth Pierce, Individually and as
Guardian ad Litem for
Merry Christine Pierce

Plaintiffs-Appellants,

vs.

John E. Fairchild, J. Scott Matthews,
and Matthews Bros., Inc.,
an Idaho Corporation

Defendants-Appellees.

Memphis White Leasing, Inc.,
a Tennessee Corporation

Plaintiff,

vs.

John E. Fairchild, J. Scott Matthews,
and Matthews Bros., Inc.,
an Idaho Corporation

Defendants.

OPINION

Nos. 79-4147, 78-1088

(Argued and Submitted Dec. 9, 1980)

(Decided April 6, 1981)

Appeal from the United States District Court for the District of Idaho

Before: GOLDBERG, WRIGHT and BOOCHEVER, Circuit Judges

Background

A tragic automobile accident provides the basis for this diversity action. In March 1976, James W. Pierce, Jr. was killed when the tractor-trailer he was driving collided with a pick-up truck owned by appellee Matthews Brothers, Inc., and occupied by appellees John E. Fairchild and J. Scott Matthews.[1] Pierce's wife and daughter brought a wrongful death suit against these three appellees.[2] The jury returned a special verdict in favor of these plaintiffs, Elizabeth and Merry Christine Pierce, in the amount of $75,000. As part of this verdict, the jury found that defendant Fairchild had been negligent and that the decedent had not been contributorily negligent. The jury also found that the pick-up truck had not been used with the express or implied permission of Matthews Brothers, Inc. at the time of the accident, and thus absolved the vehicle's owner from liability. The district judge entered judgment pursuant to the jury's verdict,[3] and the Pierces brought this appeal, contesting (1) the finding that Matthews Brothers, Inc. was not liable, and (2) the size of the damage award.

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[1]The jury determined that John Fairchild was driving the pick-up truck "with the permission of J. Scott Matthews and to serve a purpose, benefit or advantage of J. Scott Matthews." Record at 277, 282. Both Scott Matthews and John Fairchild were therefore held liable for Fairchild's negligent act. *Id.* at 284-85.

[2]This action was consolidated with the damage suit brought by the owner of the tractor-trailer, Memphis White Leasing, Inc.

[3]It was agreed by stipulation prior to trial that the damage to plaintiff Memphis White Leasing, Inc. was $11,487.96, and a judgment in that amount was entered in favor of the leasing company. Record at 285.

I. THE PERMISSION ISSUE

[1] Idaho law, by which we are bound in this diversity case, provides that

> Every owner of a motor vehicle is liable and responsible for the death or injury to a person or property resulting from negligence in the operation of such motor vehicle . . . by any person using or operating the same with the permission, expressed or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages.

Idaho Code § 49-1404. "Permission" to use a motor vehicle is a broad term, and the permittee need not drive the car himself in order for it to be operated with the permission of the owner, as long as it is operated with the permission—and for the benefit—of the permittee. *Butterfield v. Western Casualty & Surety Co.*, 83 Idaho 79, 357 P. 2d 944 (1960). For example, if parents give their child permission to use the family car, and the child allows a third person to drive the car, the parents are liable as owners whose vehicle is operated with permission. *See Farm Bureau Mutual Insurance Co. v. Hmelevsky*, 97 Idaho 46, 539 P. 2d 598 (1975); *Butterfield, supra.* Indeed, even if the child is given instructions that no one else is to drive the car, the parents are still liable for damage caused by a third person who drives the car with the child's permission. *Hmelevsky, supra*, 539 P. 2d at 602-03.[4]

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[4]Although *Butterfield, supra,* and *Hmelevsky, supra,* define "permission with regard to Idaho's Motor Vehicle Safety Responsibility Act, and not with regard to the motor vehicle statute at issue in the case at bar, there is no reason to believe that

(Continued on the next page)

In the case at bar, the jury found that John Fairchild was driving the pick-up truck with the permission—and for the benefit—of Scott Matthews. Hence, if Scott Matthews was using the truck with the express or implied permission of its owner—Matthew Brothers, Inc.—section 49-1404 would make the owner responsible for the damage caused by John Fairchild's negligence. However, the jury found that Scott Matthews had no such permission. Appellants argue that this finding was not supported by the record, and that the evidence of permission was clear and unequivocal. The issue is whether the evidence was sufficient to have warranted submission of the case to the jury, or whether the court should have granted plaintiff's motion for a directed verdict on the permission issue.

[2, 3] A directed verdict in favor of a plaintiff is to be granted only if all the evidence presented at trial had but one interpretation—in favor of liability. *United California Bank v. THC Financial Corp.*, 557 F. 2d 1351 (9th Cir. 1977); *Juhnke v. EIG Corp.*, 444 F. 2d 1323, 1325 (9th Cir. 1971). In a formulation of the directed verdict standard quoted favorably by the Ninth Circuit, the Fifth Circuit has held that a directed verdict is warranted only if "reasonable men could not arrive at a contrary verdict." *Boeing v. Shipman*, 411 F. 2d 365 (5th Cir. 1969) (en banc), quoted in *United California Bank, supra*. Since in the case at bar we are faced with a jury

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"permission" should be defined differently under two of the same state's motor vehicle laws. Moreover, both laws seem intended to ensure public safety by fostering responsibility on the part of vehicle owners, and this rationale suggests that permission should be defined in the same way under both laws.

verdict absolving the vehicle owner from liability, we are indeed hesitant to find that the trial judge should have granted a directed verdict in favor of liability. However, after a close and careful reading of the record, we cannot in good conscience conclude that the jury's verdict was supported by any reading or interpretation of the evidence. In other words, we believe that a consideration of the evidence presented at trial compels the inescapable conclusion that express or implied permission to use the Matthews Brothers' pick-up truck was indeed given to Scott Matthews, and that "reasonable men could not arrive at a contrary verdict." *See Boeing, supra.* Hence we hold that plaintiffs should have been granted a directed verdict on the permission issue, and that the district court abused its discretion in refusing to do so.

On the date of the accident, the stockholders in Matthews Brothers, Inc., consisted solely of Scott Matthews' father, uncle, and grandmother. Trial Transcript at 275, 1023. It is clear from the trial testimony that Scott Matthews often drove vehicles owned by his father and the corporation. *See, e.g., Id.* at 281, 334-35, 386. Indeed, Scott told numerous individuals that the Matthews Brothers' pick-up truck involved in the accident was purchased for him, and referred to it as his truck. *See e.g., Id.* at 230-31, 318, 914. At the time of the accident, it appears that Scott had access to no vehicles other than those owned by his father or the corporation, since he did not own a vehicle in working order. *Id.* at 118-20, 1037-38. In fact, the evidence clearly prov d that Scott had driven the truck extensively on the day of and the day before the accident. *Id.* at 120-21, 136-44, 161-75.

Moreover, Scott's father and uncle noted that the truck was bought to feed the corporation's cattle. *Id.* at

1011, 1089. Scott used the truck to feed cattle owned by Matthews Brothers. *Id.* at 136-37, 242. Robert Manning, the person who fed the cattle and was therefore in charge of the truck during feeding, *Id.* at 271, 1014, 1042-43, knew that Scott had the truck on the day of the accident and did not attempt to take it away from him or put any restrictions on its use. *Id.* at 253-73.[5]

Balanced against this weighty evidence of at least implicit permission to use the company truck are the bald assertions of interested parties, many of which directly contradicted testimony given at earlier depositions, that Scott was forbidden from using company vehicles. *See, e.g.,* Trial Transcript at 295-95, 1091-92. Even if one were to accept these assertions as true—as was well within the jury's prerogative—they could not outweigh the substantial and convincing evidence of implicit permission. The fact that an owner verbally forbade someone from using a vehicle with the understanding that he could use it anyway cannot operate to enable the owner to escape liability under Idaho Code § 49-1404. When conclusive evidence of implicit permission undercuts even an express prohibition, section 49-1404 is satisfied and the owner may be held liable for injuries and damage resulting from the vehicle's operation.

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[5]The permissible inferences under Idaho law lend support to the conclusion that the pick-up truck was used with permission. For example, a close family relationship between the owner of a vehicle and the person using it may give rise to an inference of permission. *See Eckeld v. Johnson,* 96 Idaho 264, 526 P. 2d 1100 (1974). Permission may also be inferred from leaving an unattended vehicle with the keys in the ignition, *see Steele v. Nagel,* 89 Idaho 522, 406 P. 2d 805 (1965), and this was the usual practice with regard to the pick-up truck in the case at bar. Trial Transcript at 305, 1081.

In light of the above analysis, and in light of a painfully careful reading of the record as a whole, we are firmly convinced that Scott Matthews was given implicit permission to use the pick-up truck, and that reasonable men could not differ as to this conclusion. We do not attempt to surmise why the jury found to the contrary. We simply note that plaintiffs have met the stringent standards for a directed verdict on the permission issue, and that the trial court therefore abused its discretion by refusing to grant plaintiffs' directed verdict motion.

II. THE DAMAGE AWARD

[4] Plaintiffs claim that the trial court erred in refusing to allow the jury to consider an award of punitive damages in this case. At the time this case was tried, it was unclear whether punitive damages were permissible in a wrongful death action under Idaho law. However, a recent decision by the Idaho Supreme Court has settled the issue. In *Gavica v. Hanson,* 101 Idaho 58, 608 P. 2d 861 (1980), the Court held that "our wrongful death statute, as interpreted, allows for punitive damage awards." Hence we must remand for a new trial on the punitive damage issue.[6]

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[6]In conducting the new trial, the district court may find helpful another recent decision by the Idaho Supreme Court. In *Hatfield v. Max Rouse & Sons Northwest,* 100 Idaho 840, 606 P. 2d 944 (1980), the court discussed the limits of punitive damage awards under Idaho law, and language from *Hatfield* may prove helpful in deciding whether punitive damages should be assessed in the case at bar. The court will also have to determine whether sufficient evidence is presented to justify submitting to the jury the issue of whether the corporate defendant may be liable for punitive damages. *See Boise Dodge, Inc. v. Clark,* 92 Idaho 902, 905-06, 453 P. 2d 551, 554-55 (1969).

[5] Plaintiffs also claim that the trial judge erred in refusing to grant their motion for a new trial on damages in light of what they feel was an unjustly small judgment. A judge's denial of a motion for a new trial on damages in a case tried before a jury may be reversed only for an abuse of discretion. *See Felder v. United States,* 543 F. 2d 657, 664-65 & n. 6 (9th Cir. 1976); *Merritt-Chapman & Scott Corp. v. Frazier,* 289 F. 2d 849 (9th Cir., *cert. denied,* 368 U. S. 835, 82 S. Ct. 60, 7 L. Ed. 2d 36 (1961); *Stafford v. Perini Corp.,* 475 F. 2d 507; 512 (1st Cir. 1973); *Traylor v. United States,* 396 F. 2d 837 (6th Cir. 1968). Such a finding is to be made only in "shocking" or "exceptional" circumstances, *see Estes v. Southern Pacific Transportation Co.,* 598 F. 2d 1195, 1200 (5th Cir. 1979); *Brown v. Louisiana & Arkansas Ry.,* 429 F. 2d 1265 (5th Cir. 1970), such as where the award is substantially less than the unquestionably proven damages. *See Traylor, supra,* 396 F. 2d at 839 & n. 1. In such a case, the appellate court is faced with a double hurdle: it must first find that the jury's damage award is inconsistent with the evidence, and then find that the trial court abused its discretion in not setting it aside. *See Felder, supra,* 543 F. 2d at 664-65 & n. 6 However, the two hurdles have been overcome in past cases, and district courts have been reversed for abusing their discretion in refusing to grant a new trial on damages after an unjust jury verdict. *See, e.g., Lester v. Dunn,* 475 F. 2d 983 (D. C. Cir. 1973); *Vidrine v. Kansas City Southern Ry.,* 466 F. 2d 1217, 1266 (5th Cir. 1972); *Devine v. Patteson,* 242 F. 2d 828 (6th Cir.), *cert. denied,* 355 U. S. 821, 78 S. Ct. 27, 2 L. Ed 2d 36 (1957).

[6] In the case at bar, the jury awarded plaintiffs $75,000 for the death of James Pierce. The uncontra-

dicted evidence at trial showed that the decedent was 36 years old and in good health when killed. He left surviving a wife and fifteen year-old child. Trial Transcript at 597, 668-701. He had a life expectancy of about 36 more years, and could have expected to continue working for about 29 more years had his life not been tragically cut short. *Id.* at 609-11. The decedent earned about $16,000 in each of the years 1973 and 1974, and in 1975, the last year of his life, he earned about $18,000. *Id.* at 608; Plaintiffs' Exhibits 65, 66, 128. Taking only lost wages into account, and not even considering cost of living increases or other salary raises which might be expected, a simple exercise in multiplication reveals the gross inadequacy of a $75,000 award. Even after one takes into account the taxes decedent would have had to pay, the amount which decedent would have himself consumed, and the present value discount of future earnings, it is clear that the jury's award was manifestly unjust. Indeed, the $75,000 award represents little more than four years of the decedent's salary at its 1975 rate. In light of plaintiffs' economist's calculation that the lost wages from the time of the accident to the time of trial were alone over $58,000, Trial Transcript at 615, the $75,000 award seems miserly at best.

Moreover, when one takes into account such factors as potential retirement benefits, lost inheritance,[7] and the

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[7]The trial court did not instruct the jury that potential lost inheritance was recoverable. *See* Trial Transcript at 1130-35. However, in light of the fact that the Idaho Supreme Court has found that state's wrongful death law to be "as liberal as any we have examined," *Hepp v. Ader*, 64 Idaho 240, 130 P. 2d 859 (1942); *see Meissner v. Smith*, 94 Idaho 563, 494 P. 2d 567 (1972), and in light of the fact that other courts have allowed

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loss of services, society and companionship, the Scrooge-like penuriousness of the jury's award becomes even more astonishing. The judgment in the case at bar is substantially less than the unquestionably proven damages, and the trial judge's refusal to grant a new trial on damages was indeed an abuse of discretion. *See supra*, slip op. pages 1142-1143, pages ——. We are therefore compelled to reverse the trial court's decision and to order a new trial on damages.

III. CONCLUSION[8]

It is the exceptional case in which the jury's verdict is found to be clearly contrary to the evidence. The case at bar is doubly exceptional, since both the jury's assessment of damages and its verdict on the permission issue are unsupported by the record. We make no attempt to guess why the jury absolved Matthews Brothers from liability or why it went to the bargain basement in order to calculate damages. We merely hold that a directed verdict should have been given on the permission issue, since

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the recovery of potential lost inheritance, *see, e. g., Martin v. Atlantic Coast Line R. R.*, 268 F. 2d 397 (5th Cir. 1959); *Platis v. United States*, 288 F. Supp. 254, 275 (D. Utah 1968), *aff'd*, 409 F. 2d 1009 (10th Cir. 1969); *Salinas v. Kahn*, 2 Ariz. App. 181, 407 P. 2d 120 (Ariz. Ct. App.), *modified on other grounds*, 2 Ariz. App. 348, 409 P. 2d 64 (Ariz. Ct. App. 1965); *Reynolds v. Willis*, 58 Del. 368, 209 A. 2d 760 (1965), we believe that the Idaho courts would allow the recovery of potential lost inheritance in a wrongful death case.

[8]Because we grant the relief sought, we need not consider the remaining arguments raised by appellants.

the only reasonable interpretation of the evidence was in favor of liability, and that a new trial on damages should have been granted, since the jury's award was manifestly unjust. Moreover, because recent Idaho case law holds that punitive damages may be awarded in a wrongful death action, the district court must determine whether such damages are proper here.

The jury is at the very heart of our legal system, and great deference must be paid to its verdicts. However, the appellate courts are more than mere rubber stamps, and where a jury verdict is manifestly erroneous, unreasonable, and unjust, it must not be allowed to stand. We therefore reverse the trial court's refusal to grant a directed verdict on the permission issue, and its refusal to grant a new trial on damages. We remand for an order by the district court holding Matthews Brothers, Inc. liable under Idaho Code § 49-1404. We also remand for a new trial on damages, during which the court should permit the jury to consider whatever damages Idaho's wrongful death law allows, including punitive damages and lost inheritance.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4147

Civ. No. 1-76-109

Consolidated with Civ. No. 78-1088

ELIZABETH PIERCE, Individually and as Guardian ad Litem for MERRY CHRISTINE PIERCE,

Plaintiffs-Appellants,

vs.

JOHN E. FAIRCHILD, J. SCOTT MATTHEWS and MATTHEWS BROS., INC., an Idaho corporation,

Defendants-Appellees.

AND

MEMPHIS WHITE LEASING, INC.,
a Tennessee corporation,

Plaintiff,

vs.

JOHN E. FAIRCHILD; J. SCOTT MATTHEWS; AND MATTHEWS BROS., INC., an Idaho corporation,

Defendants.

O R D E R

Before: GOLDBERG,* WRIGHT and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing is rejected.

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*Honorable Irving L. Goldberg, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

U. S. District Court
District of Idaho
Filed at 8:30 A M.

Sep 13, 1981

Jerry L. Clapp, Clerk
By BAC, Deputy

No. 79-4147

DC CV 76-109 RM

ELIZABETH PIERCE, etc., et al.,

Plaintiffs-Appellants,

vs.

JOHN E. FAIRCHILD, J. SCOTT MATTHEWS and MATTHEWS BROS., INC., etc.,

Defendants-Appellees.

MEMPHIS WHITE LEASING, INC., etc.,

Plaintiff.

vs.

JOHN E. FAIRCHILD, et al.,

Defendants.

APPEAL from the United States District Court for the District of IDAHO (Boise).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ..... District of IDAHO (Boise) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

A TRUE COPY
ATTEST

Received 16 Sep. 1981
Clerk of Court

by: /s/ Oscar Tagle
Deputy Clerk

Filed and entered April 6, 1981

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4147 CIVIL CASE NO. 1-76-109
CONSOLIDATED WITH CIVIL CASE NO. 78-1088

ELIZABETH PIERCE, Individually and as Guardian ad Litem for MERRY CHRISTINE PIERCE,
Plaintiffs-Appellants,

vs.

JOHN E. FAIRCHILD, J. SCOTT MATTHEWS and MATTHEWS BROS., INC., an Idaho corporation,
Defendants-Appellees.

AND

MEMPHIS WHITE LEASING, INC.,
a Tennessee corporation,
Plaintiff,

vs.

JOHN E. FAIRCHILD; J. SCOTT MATTHEWS; AND MATTHEWS BROS., INC., an Idaho corporation,
Defendants.

O R D E R

Before: GOLDBERG* WRIGHT and BOOCHEVER, Circuit Judges.

The opinion heretofore filed on April 6, 1981 is withdrawn as an opinion for publication. It will be refiled as a Memorandum and will not be published.

*Senior United States Circuit Judge for the Fifth Circuit.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 78-1088

MEMPHIS WHITE LEASING, INC.,
a Tennessee corporation,
Plaintiff,

vs.

JOHN E. FAIRCHILD; J. SCOTT MATTHEWS;
and MATTHEW BROS., INC., an Idaho corporation,
Defendants.

Civil No. 1-76-109

ELIZABETH PIERCE, Individually and as Guardian
ad Litem for MERRY CHRISTINEE PIERCE,
Plaintiffs,

vs.

JOHN E. FAIRCHILD; J. SCOTT MATTHEWS; and
MATTHEWS BROS., INC., an Idaho corporation,
Defendants,

and

JOHN E. FAIRCHILD,
Third Party Plaintiff,

vs.

J. SCOTT MATTHEWS, and MATTHEWS BROS.,
INC., an Idaho corporation,
Third Party Defendants.

JUDGMENT ON JURY VERDICT

This matter came on for trial before a jury on October 30, 1978, and continued from day to day until November 9, 1978.

All parties were present and represented by counsel of record. Oral and documentary evidence was received; counsel addressed the jury in closing arguments; and the Court instructed the jury as to the applicable law.

The jury returned a unanimous verdict by way of a Special Verdict consisting of interrogatories.

The jury found:

1. That the vehicle owned by the defendant Matthews Bros., Inc., was being driven without the express or implied consent of the corporation.

2. That the defendant and third-party plaintiff John E. Fairchild was driving the vehicle owned by the defendant Matthews Bros., Inc., at the time of the accident.

3. That the defendant and third party plaintiff John E. Fairchild in so driving the said vehicle was negligent and that his negligence was the proximate cause of the death of James W. Pierce and the damage to the vehicle owned by the plaintiff Memphis White Leasing, Inc.

4. That the defendant and third-party plaintiff John E. Fairchild was driving the vehicle owned by the defendant Matthews Bros., Inc., with the permission of J. Scott Matthews to serve a purpose, benefit, or advantage of J. Scott Matthews.

5. That James W. Pierce, the decedent, was not negligent.

6. That the plaintiffs Elizabeth Pierce and Merry Christine Pierce suffered damage in the sum of seventy-five thousand ($75,000.00) dollars.

By Stipulation, it was agreed prior to trial that damage to the plaintiff Memphis White Leasing, Inc., was the sum of $11,487.96.

Based on the verdict of the jury and the records and files of this case, the Court orders, adjudges and decrees as follows:

1. Plaintiff Memphis White Leasing, Inc., is granted judgment against the defendants John W. Fairchild and J. Scott Matthews in the sum of $11,487.96, together with costs.

2. That the Complaint of the plaintiff Memphis White Leasing, Inc., against the defendant Matthews Bros., Inc., is dismissed with costs to said defendant.

3. That the plaintiffs Elizabeth Pierce and Merry Christine Pierce are granted judgment against the defendants John E. Fairchild and J. Scott Matthews in the sum of $75,000.00 together with costs.

4. That the Complaint of the plaintiffs Elizabeth Pierce and Merry Christine Pierce against the defendant Matthews Bros., Inc., is dismissed with costs to said defendants.

5. That the Third-Party Complaint of John E. Fairchild against the third-party defendants J. Scott Matthews and Matthews Bros., Inc., is dismissed with costs to said defendants.

/s/ Ray McNichols
Ray McNichols, Chief Judge
United States District Court

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

(Civil No. 78-1088)

MEMPHIS WHITE LEASING, INC.,
a Tennessee corporation,

Plaintiff and Counterdefendant,

vs.

JOHN E. FAIRCHILD; J. SCOTT MATTHEWS; and MATTHEWS BROS., INC., an Idaho corporation,

Defendants.

and

JOHN E. FAIRCHILD,

Counterclaimant.

(Civil No. 1-76-109)

ELIZABETH PIERCE, Individually and as Guardian ad Litem for MERRY CHRISTINE PIERCE,

Plaintiffs,

vs.

JOHN E. FAIRCHILD; J. SCOTT MATTHEWS; and MATTHEWS BROS., INC., an Idaho corporation,

Defendants,

and

JOHN E. FAIRCHILD,

Third Party Plaintiff,

vs.

J. SCOTT MATTHEWS, and
MATTHEWS BROS., INC., an Idaho corporation,

Third Party Defendants.

ORDER DENYING ALTERNATIVE MOTION OF THE PLAINTIFFS, ELIZABETH PIERCE AND MERRY CHRISTINE PIERCE, FOR ENTRY OF JUDGMENT N.O.V. OR ALTERNATIVELY FOR A NEW TRIAL

On November 13, 1978, the Court entered a Judgment based on a Jury Verdict adverse to the above-named plaintiffs. Said plaintiffs now make a timely Motion for Judgment N.O.V. and/or Alternative for Allowance of a New Trial. The Motion is based on alleged errors in the admission of evidence, on the instructions given to the Jury, and on the contention that some or all of the Judgment is contrary to the weight of the evidence.

The Court has carefully considered the Motion, the underlying showing, and has reviewed the facts of the case. The Court finds that the motions are without merit.

IT IS THEREFORE ORDERED:

That the Alternative Motion of the above-named plaintiffs for Judgment N.O.V. and/or for Allowance of a New Trial be, and the same hereby is, DENIED.

/s/ Ray McNichols
Ray McNichols, Chief Judge
United States District Court